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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

COMMONWEALTH OF MASSACHUSETTS

VOL. VIII.

CONTAINING THE CASES FROM SEPTEMBER TERM, 1811, IN HAMPSHIRE, TO MARCH TERM, 1812, IN SUFFOLK, INCLUSIVE

BY DUDLEY ATKINS TYNG, ESQ.
COUNSELLOR AT LAW.

WITH NOTES

AND

REFERENCES TO THE ENGLISH AND AMERICAN CASES.

BY BENJAMIN RAND ESQ.
COUNSELLOR AT LAW.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF HAMPSHIRE, SEPTEMBER TERM, 1811 AT NORTHAMPTON.

PRESENT:

Hon. THEODORE SEDGWICK,
Hon. SAMUEL SEWALL,
Hon. ISAAC PARKER,
} Justices.

David Fowler, Plaintiff in Error, *versus* Titus Bigelow and Elizabeth, his Wife.

Referees appointed pursuant to the statute of 1786, c. 21, have no jurisdiction of questions concerning the title to real estate.

This writ of error was brought to reverse a judgment of the Court of Common Pleas for this county, rendered upon the report of referees appointed by a rule between the parties, made before a justice of the peace, under the statute of 1786, *c.* 21.

The demand made by the defendants in error, on which the submission to the referees was founded, was of one half of the real estate of *David Fowler*, deceased, father of the said *David*, the plaintiff in error, and of the said *Elizabeth*, and of the rents and profits thereof since the decease of their said father, and costs; and it purported to give to the referees power to divide the estate as they should judge equitable, and to revise, alter, annul, or confirm any former division or judgment respecting the same, and to

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determine and award thereon, notwithstanding any former report of referees should have been ratified at court; and
[* 2] *also to determine and award upon the costs of any former decision or hearing upon such estate.

The submission was in the form contained in the statute.

The referees made their award to the Common Pleas; in which, among other things, they assign to the said *Elizabeth* certain specific parcels of the real estate of her said father, and to the plaintiff in error all the remainder; and upon this report the Court of Common Pleas entered judgment.

One of the errors assigned was, that "the referees, in and by their said award and report, have taken upon themselves to make partition of the estate of the said *David Fowler*, deceased, when by law they had no power or authority so to do."

By the Court. The uniform construction of the statute, on which the proceedings in this case were founded, has confined its operation exclusively to personal demands. The words of the statute plainly show this to have been the intention of the legislature. In the fourth section there is a provision that the determination of the referees may, by consent of the parties, be made known to them prior to its being returned to the court; and, in such case, it is made lawful for the party who may be found *indebted*, to *discharge* himself therefrom, by *paying* the same to the person to whom it shall be awarded, and having his *receipt therefor* on the back of the determination, &c.

The proceedings in this case were unauthorized by the statute. The report of the referees was void, and the judgment founded thereon erroneous. It must, therefore, be reversed.

Bliss and *Ashmun* for the plaintiff in error.

Ingersoll and *Lathrop* for the defendants in error. (*a*)

(*a*) [The language of the statute referred to seems to be broad enough to embrace disputes concerning lands, for it speaks of "disputes of what nature soever;" and the provision that any one who shall be found indebted may discharge himself from the award by paying the sum awarded, is intended only to specify the cases where there may be a valid discharge by a receipt upon the award, and not to qualify the meaning of the language before mentioned, or limit the subjects of submission or reference. But, without reference to the statute, the award having been made by arbitrators chosen by the parties, upon a matter submitted to them by the agreement of the parties in writing, there seems to have been no reason why it should not have been binding on them at common law. A disputed right or title to real estate may be submitted to arbitration by the parties, and the award, made pursuant to the submission, will estop them from setting up any right or title against it. *Doe* vs. *Rossen*, 3 *East*, 15. — *Robertson* vs. *M'Niel*, 12 *Wend.* 578. — *Cox* vs. *Jager*, 2 *Cow.* 638. — *Jackson* vs. *Gager*, 5 *Cow.* 383. — *Prosser* vs. *Goring*, 3 *Taunt.* 426. — *Knight* vs. *Burton*, 6 *Mod.* 231. — 1 *Salk.* 75. — *Trusloe* vs. *Yewre*, *Cro. Eliz.* 223. — *Dyer*, 183, note. — 2 *Leon.* 104. — 8 *East*, 39. — 3 *Camp.* 444. — *Baker* vs. *Townsend*, 1 *Moore*, 120. — 7 *Taunt.* 422. — *Byers* vs. *Van Deusen*, 5 *Wend.* 268. — *Johnson* vs. *Wilson*, *Willes*, 248. — 7 *Mod.* 345 — See *Brown* vs. *Bellows*, 4 *Pick.* 179. — *Gilman* vs. *Brown*, 14 *Mass.* 128. By the Re-

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*DAVID HAWLEY AND OTHERS, Plaintiffs in Error, *versus* THE INHABITANTS OF NORTHAMPTON.

A devises sundry parcels of land to his nephews, *B* and *C*, severally, and in distinct parts, to have and to hold the parts devised to *B*, *to him, his heirs and assigns, forever, on the conditions and limitations after in his will mentioned;* and to have and to hold the parts devised to *C*, *to him, his heirs and assigns, forever, on the conditions and contingencies after mentioned in his will.* The testator then adds, "And it is my will and pleasure, and I have made the foregoing devises and bequests with the provision and limitation that, if it should so happen that the said *B* should decease, *leaving* no heirs of his body lawfully begotten, and the said *C, or any heirs by him the said C lawfully begotten*, then alive, that in such case all the devises and bequests of real estate hereinbefore made to the said *B* should be and remain to him the said *C or such his said heirs.* And in case the said *C* should *decease*, leaving no heirs of his body begotten, living the said *B or any heirs of his body lawfully begotten*, in such case all the lands hereinbefore devised to the said *C* shall be and remain to the said *B* or such his said heirs. But in case both the said *B* and *C* should decease, leaving no heirs of either of their bodies begotten, then all the lands hereinbefore given to the said *B* and *C*, or either of them, *shall be and remain to the children of my brethren and sister who shall then survive.*" This was held to be a devise to the two nephews in tail, with cross remainders in tail, and a contingent remainder to the children of the testator's brethren and sister living when these estates tail should be spent.

THE plaintiffs in error, being the children and heirs at law of *Moses Hawley*, deceased, brought this writ of error, September term, 1808, to reverse a judgment of this Court rendered in May, 1792, in favor of the defendants in error against the said *Moses*.

The original action was *entry sur disseisin*, brought by the said *Moses Hawley*, counting on his own *seisin* in fee, and upon a disseisin of the said inhabitants, in which he demanded sundry parcels of land in said *Northampton*, and also one undivided third part of certain other parcels of land within the same town. Upon not guilty pleaded, the jury returned a special verdict, finding, among other things, a common recovery theretofore suffered by *Joseph Hawley*, Esq., under whose last will the said inhabitants claimed to hold the demanded premises, and upon which verdict they obtained their judgment.

At the term of this Court holden in September, 1809, the defendants in error pleaded the general issue, *in nullo est erratum;* and the cause coming on to be heard,

Bliss, for the plaintiffs in error, suggested that the verdict did not

vised Statutes of *Massachusetts*, it is provided that all controversies which might be the subject of a personal action at law, or of a suit in equity, may be submitted to the decision of one or more arbitrators, in the manner provided in chapter 114. — ED.]

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find the common recovery to have been executed, which he contended to be necessary. After some discussion of this question, a copy of the record of the common recovery being produced, and it appearing to have been duly executed, the parties agreed
[* 4] that the former * judgment should be reversed, and a *venire facias de novo* be awarded.

Accordingly, at the succeeding term, April, 1810, a new trial was had, and a special verdict was found, in substance as follows: —

The jury find, that, long before the time when the disseisin alleged in the original declaration is supposed to have been done, *to wit*, on the 29th day of July, 1751, one *Ebenezer Hawley* was seised in his demesne, as of fee, of the lands, tenements, and hereditaments named in the declaration, and being so seised, on the day and year aforesaid, at *Northampton* aforesaid, made and published his last will, duly executed and attested to pass lands, whereby the said *Ebenezer* devised, among other things, as follows: —

"Further, I give to my said wife the whole use, and income, and improvement of my house, barn, and house-lot, and one half of all my land lying in the common field or meadow, so called, in said *Northampton*, and of one third part of my out or wood lands, for and during the term of her natural life, and no longer. And I give the one half of," &c. *designating sundry parcels of the land contained in the common field or meadow, and of which he had before devised one half to his wife for life*] "to the said *Elisha Hawley*," [*nephew to the testator*,] "immediately to be possessed after my decease; and the remainder of the other half of all and each of the last said lots, and the remainder of my homestead, with the buildings thereon, to come into possession immediately after my wife's decease. To have and to hold to him, the said *Elisha Hawley*, his heirs and assigns forever, on the conditions and contingencies hereinafter mentioned. — Also I give to the said *Elisha Hawley*," [*designating another specific parcel of land*,] for and during the term of my said wife's life, and no longer. — Also I give to the said *Joseph Hawley*, my nephew, the one half of" [*designating*
[* 5] *sundry other parcels of the land, of which he had before * devised the one half to his wife for life*,] "in possession immediately on my decease, and the remainder of the other half of all the last-mentioned lots or pieces of land, and the remainder of the whole of the before-mentioned lot, which my said wife and the said *Elisha Hawley* are to have the use of during the life of my said wife; to come into his possession immediately on my said wife's decease. To have and to hold to him, the said *Joseph Hawley*, his heirs and assigns forever, on the conditions and contingencies hereinafter mentioned. — Also I give all my woods or outlands to the said

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Joseph Hawley and *Elisha Hawley*, two third parts thereof in immediate possession, and the possession of the other third part thereof expectant on my wife's decease; to have and to hold the one third part of all my said wood lands to him, the said *Joseph Hawley*, his heirs and assigns forever, on the condition hereinafter expressed; and the other two third parts of said wood land to him, the said *Elisha Hawley*, his heirs and assigns forever, on the condition and under the limitation hereinafter expressed. And it is my will and pleasure, and I have made the foregoing devises and bequests, with this provision and limitation, that if it should so happen that the said *Joseph* should decease leaving no heirs of his body lawfully begotten, and the said *Elisha*, or any heirs by him, the said *Elisha*, begotten then alive, that in such case all the devises and bequests of real estate hereinbefore made to the said *Joseph*, should be and remain to him the said *Elisha*, or such his said heirs: —and in case the said *Elisha* should decease leaving no heirs of his body begotten, living the said *Joseph* or any heirs of his body lawfully begotten, in such case all the lands before herein devised to the said *Elisha* shall be and remain to the said *Joseph*, or such his said heirs: —but in case both the said *Elisha* and *Joseph* should decease, leaving no heirs of either of their bodies begotten, then all the lands hereinbefore given to them, the said *Joseph* and *Elisha*, and either of * them, shall [* 6] be and remain to the children of my brethren and sister who shall then survive."

The jury further find, that the said *Ebenezer* continuing so seised, on the 18th of August, 1751, died without having altered or revoked his said will, which was afterwards duly proved.

They further find, that upon the death of the said testator, his said widow and his two nephews aforesaid severally entered into such parts of the premises, so as aforesaid devised to them, as by law they were authorized to enter into, and became severally seised of such estates in the devised premises as could lawfully pass to them by the said will. And being so seised, the said *Elisha*, on the 24th of September, 1755, died without having had issue of his body; and thereupon the said *Joseph* entered into that part of the premises devised as aforesaid to the said *Elisha*, and became and was seised of such an estate therein as could lawfully pass to the said *Joseph* by the said will upon the death of the said *Elisha* as aforesaid. And the said widow of the testator, being so seised, died on the 2d of March, 1781, whereupon the said *Joseph* entered into all that part of the premises devised to her as aforesaid, and became and was seised of such an estate therein as might lawfully

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pass to him upon the death of the said widow, and the death of the said *Elisha* without issue as aforesaid.

They further find, that after the death of the testator's widow and of the said *Elisha*, to wit, in the year 1783, the said *Joseph*, being so seised of such an estate in the demanded premises as might lawfully pass as aforesaid by the will of the said *Ebenezer* to him, at a Court of Common Pleas holden at *Northampton* on the last Tuesday of August in the same year, suffered a common recovery, with single voucher and duly executed, of the lands, tenements, and hereditaments named in the declaration, to his own use in fee simple, in due form of law, and thereupon entered, &c., and
[*7] became and was seised, as the law requires, of such *an estate therein as by law might or could pass to him by virtue of the said will and the said common recovery suffered and executed as aforesaid.

They further find, that the said *Joseph*, so seised as aforesaid of all the lands, tenements, and hereditaments named in the declaration, on the 27th of September, 1783, made and published his last will, duly executed and attested to pass lands, in the words following, viz. "Whereas the fee simple in and of the lands and tenements, which my honored uncle, *Ebenezer Hawley*, formerly of *Northampton* in the county of *Hampshire*, deceased, died seised of, has lately accrued to me *Joseph Hawley*, of the same *Northampton*, Esquire, by virtue and by force of a common recovery suffered by me to be had of the said lands and tenements by my trusty and worthy friend Captain *Samuel Clark*, of *Northampton*, aforesaid, in and at the last session of the Court of Common Pleas held at the said *Northampton*, within and for the aforesaid county of *Hampshire*, on the last Tuesday of August last; of which lands and tenements until then I was tenant in fee tail, and since the aforesaid session, the said recovery executed, and also by virtue of a bargain and sale of the same lands and tenements *bonâ fide* made to me by the said *Clark*, by his deed duly executed and registered in the registry of deeds for the said county of *Hampshire*.

"I, the said *Joseph Hawley*, because of the great uncertainty of human life, and because I am not at present sufficiently advised to make any other disposition of the aforesaid lands and tenements, and being of sound and disposing mind and memory, (blessed be God,) on this twenty-seventh day of September, A. D. 1783, do give and devise all the said lands and tenements mentioned or described in the writ of entry whereon the said common recovery was suffered, excepting such parts of them as I have heretofore, or shall before my decease, by deed or deeds executed, convey to

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others; I say I do hereby give and devise all the said lands and tenements (excepting *as is above excepted) to [*8] the inhabitants of the above town of *Northampton*, in their corporate capacity as a town. To have and to hold the above devised premises, with the appurtenances, in their corporate capacity as a town, to them and their successors forever, to be holden forever without distribution, by the town which the General Court of *Massachusetts* shall consider and deem to be the same corporation as the present town of *Northampton* in the county of *Hampshire*, however the present township of *Northampton* may hereafter by the General Court be divided. — And I most heartily recommend to the said town, that they should carefully see to it that the schools, as the laws of this commonwealth do or shall require the said town to maintain, be supported and maintained in a steady and liberal manner, and by faithful and able masters taught and instructed; an affection to learning and the good education of the successive generations of the lads of *Northampton* being a great motive to the making this devise, as well as hearty benevolence to the town where I was born and lived most of my days, and which has seen fit from the early days of my manhood to honor me with many instances of their respect, esteem, and confidence. In witness whereof, I the said *Joseph Hawley*, after appointing the town clerk of the said *Northampton*, for the time being, executor of this testament, have hereunto set my hand and seal the day and year above written." And continuing so seised as aforesaid, the said *Joseph*, on the 10th of March, 1788, died without leaving issue of his body, and without having altered or revoked his said will, which was afterwards duly proved and approved.

The jury further find, that all the lands, tenements, and heredita ments named in the declaration are parcel of the lands, tenements, and hereditaments described and devised in the will of the said *Ebenezer*, and the will of the said *Joseph*; and that the said *Joseph* never made any other disposition of the demanded premises, or any part thereof, *than is made by the said last will and testament [*9] of the said *Joseph*; and that the said inhabitants, after the death of the said *Joseph* as aforesaid, entered into the demanded premises under and by virtue of the will aforesaid of the said *Joseph*, claiming to hold the same in fee simple, and became and were seised of such an estate in the same, as by law could pass to them by the said will of the said *Joseph*. And they, the said inhabitants, being so seised, the said *Moses*, the demandant, entered into the same premises after the death of the said *Joseph*, and before the commencement of his action, and ejected the said inhabitants, and became and was seised of such an estate therein as might lawfully

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pass to the said *Moses* after the death of the aforesaid widow and of the said *Elisha* and *Joseph;* and thereupon the said inhabitants reëntered into the said premises, and expelled the said *Moses* therefrom, and became and were seised of such an estate therein as might lawfully pass to them upon the death of the said *Joseph* by virtue of his last will aforesaid.

They further find, that *Joseph Hawley*, *Samuel Hawley*, *Thomas Hawley*, and *Lydia Dwight*, once *Lydia Hawley*, were the brothers and sister of the said *Ebenezer*, the testator; that the said *Joseph* and *Elisha Hawley*, named as devisees in the said will of the said *Ebenezer*, were children and only heirs at law of *Joseph Hawley* deceased, the brother of the said *Ebenezer;* that *Moses Hawley*, the demandant, *Dorothy Kellogg*, and *Lydia Morton* were children and only heirs at law of *Samuel Hawley* deceased; that *Elijah Hawley*, *Hannah Benedict*, *Lydia Beers*, and *Abigail Birdsey* were the children of the said *Thomas Hawley* deceased; that *Joseph Dwight*, *Josiah Dwight*, *Simeon Dwight*, *Seth Dwight*, *Elisha Dwight*, and *Anna Pynchon* were the children of the said *Lydia Dwight* deceased; that the said *Samuel Hawley* and *Thomas Hawley* survived the said *Ebenezer;* and that the said *Elisha Hawley*, *Hannah Benedict*, *Lydia Beers*, *Abigail Birdsey*, *Lydia Morton*, [* 10] *Moses Hawley*, *Dorothy Kellogg*, *Elijah Dwight*, * and *Anna Pynchon* were the only children of any brother or sister of the said *Ebenezer* living at the death of the said *Joseph Hawley*, the devisee aforesaid, and were heirs at law of the said *Joseph* last named, at the time of his death; and that the said *Samuel Hawley*, *Thomas Hawley*, *Joseph Hawley*, the devisee aforesaid, *Elisha Hawley*, *Joseph Dwight*, *Josiah Dwight*, *Simeon Dwight*, *Seth Dwight*, *Elisha Dwight*, and *Anna Pynchon* were the only heirs at law of the said *Ebenezer* at the time of his death; that the said *Joseph Hawley*, the devisee as aforesaid, was the only heir at law of his brother, the said *Elisha;* and that neither the said *Samuel Hawley*, *Thomas Hawley*, or *Lydia Dwight*, survived the said *Joseph Hawley*, devisee as aforesaid under the will of the said *Ebenezer:* —

But whether the said inhabitants committed the disseisin alleged against them by the said *Moses*, the jurors aforesaid are wholly ignorant, and thereof pray the opinion of the Court here. And if the Court shall be of opinion, upon the whole matter, that the said *Moses Hawley* was entitled to recover any part of the demanded premises as devisee under the said will of the said *Ebenezer*, then they find that the said inhabitants did disseise the said *Moses* of, &c.; if the Court shall be of opinion that the said *Moses* was entitled to recover any part of the demanded premises as heir at

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law of the said *Ebenezer*, then they find that the said inhabitants did disseise the said *Moses* of, &c.; but if the Court shall be of opinion that the said *Moses* was not entitled to recover any part of the demanded premises, either as devisee or heir at law of the said *Ebenezer*, then they find that the said inhabitants did not disseise the said *Moses*, &c.

At the next term, it was proposed by *Bliss* and *L. Strong*, the counsel in this action, to furnish the Court with their respective points and authorities, instead of a *vivâ voce* argument at the bar. This was approved by the Court; and the reporter thinks he cannot more gratify the profession than by transcribing the manuscripts of the counsel; in * which as much brevity has [* 11] perhaps been used, as was consistent with full justice to their respective arguments.

L. Strong for the defendants in error. The inhabitants of *Northampton* derive a legal title to the land in dispute, under the will of *Ebenezer Hawley*, and the common recovery suffered by *Joseph Hawley*. In support of this opinion, we rely upon the following propositions; at the same time remarking that the argument now urged is not materially different from that delivered previous to the original judgment, except in its arrangement and the addition of some new points and authorities.

I. In all conveyances, words that would carry a fee may be so restrained by subsequent words as to give only an estate tail.

1. In common law conveyances. (1)

2. In a will. (2)

The case when lands are given to *a man and his heirs*, and *if he die without issue*, remainder over, is sometimes spoken of, by way of illustration, as the common case of an estate tail. (3)

Even at common law, therefore, if lands be conveyed to *a man and his heirs*, or to *one, his heirs and assigns*, and *in default of issue*, or *if he die without issue*, or *without heirs of his body*, then over, the feoffee takes only an estate tail; and in the case of wills, if the limitation over be by the words *if he die without leaving issue of his body*, the devisee takes a like estate, although the estate devised be charged with the payment of an annuity.

II. When lands are given to a man and his heirs, or to one, his heirs and assigns, with remainder over upon failure of issue, if the

(1) *Lee* vs. *Brace*, 5 *Mod.* 266. — *Co. Lit.* 21, *a.* — *Plowden*, 541. — *Cotton's case*, 3 *Leon.* 5.

(2) *Holmes* vs. *Meynell*, *Sir T. Ray.* 453. — *Wilson* vs. *Kipping*, *ib.* 426. — *Chadock* vs. *Cowley*, *Cro. Jac.* 695. — *Nottingham* vs. *Jennings*, 1 *L. Raym.* 568. — *Barnard & Al.* vs. *Reason*, 3 *Wils.* 244. — *Morgan* vs. *Griffiths*, *Cowp.* 234. — *Gearing* vs. *Shenton*, *ib.* 410.

(3) *Law* vs. *Davis*, 2 *Strange*, 850.

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failure of issue be not confined to a life in being, or a limited term of years afterwards, the estate is a fee tail.

If the first proposition be established, the truth of the second results from the necessity of carrying into effect, so far as it can be done consistently with the rules of law, the obvious intention of testators; since it is a rule well known and settled that,

[* 12] * III. An executory devise must necessarily vest within a life or lives in being, or twenty-one years and the fraction of a year afterwards. (4)

IV. A devise of lands to one and his heirs, or to one, his heirs and assigns, and if he die without issue, or without leaving issue, or leaving no issue, then over; such directory words are construed to be words of limitation, and to intend an indefinite failure of issue, and the devise over can take effect only as a remainder.

1. They are words of limitation. This appears from the cases already cited, as it respects the words *without issue* and *without leaving issue*. And it was holden in *Forth* vs. *Chapman*, (5) and in *Atkinson* vs. *Hutchinson*, (6) that there was no difference between a dying *without leaving issue* and *leaving no issue*. So, where a testator, in case his eldest son should die, and *leave no issue of his body*, after his decease, gave the lands to his youngest son and his heirs; it was held that the eldest son took an estate tail by implication, and that the devise to the youngest son was a remainder. (7) The words, then, *without issue*, *without leaving issue*, or *leaving no issue*, are all to be construed as words of limitation, and to give the first devisee an estate tail, unless they confine the failure of issue to a life in being and a limited term of years afterwards. But,

2. They intend an indefinite failure of issue. In a *formedon in remainder* or *reverter*, whenever the issue of the first donee fail, he is said to have died without issue. (8) And, probably in allusion to this circumstance, when lands are given to a man and his heirs, and if he die without issue, remainder over, the words *dying without issue*, though, in common parlance, they are understood a dying without issue at his death, denote a failure of issue at an indefinite future period.

For many years after executory devises were introduced, the construction of expressions respecting a failure of issue, when applied to terms and chattel interests, was frequently varied; and

[* 13] at no period has it been perfectly * uniform; yet the construction of those expressions has been generally the same

(4) *Long* vs. *Blackall*, 7 *D. & E.* 100. — *Thelusson* vs. *Woodford*, 4 *Bos. & Pul.* 392
(5) 1 *P. Will* 664. (6) 3 *P. Will.* 259.
(7) *Walter* vs *Drew*, *Com. Rep.* 372. (8) *Buckmere's case*, 8 *Rep.* 88, *a.*

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with respect to real estates. In the latter part of *Queen Anne's* reign, the courts took a distinction between devises of terms and of freeholds; determining that in the latter case the words *if he die without issue* are inserted in favor of the issue, and must intend an indefinite failure of issue; but in the former they could not have been inserted in favor of the issue, as the father takes the whole term, which will not go to his issue, but to his executor, and must therefore limit the dying without issue to the time of the death. (9) The same distinction was taken in *Forth* vs. *Chapman*, and *Atkinson* vs. *Hutchinson*, and has been recognized by Lord *Mansfield*, (10) Lord *Hardwicke*, (11) and Lord *Kenyon*. (12) Many other cases may be cited as in point. (13)

From an examination of the authorities now cited it will appear, that the words *if the said* G. *happen to die without issue*, — *if* W. *should depart this life not having issue*, — *in case all my said children should die without leaving any issue*, — *if the said* S. *should happen to die without leaving issue of his body*, — *in case* T. *should leave no such child or children*, — *if* A. *should die and leave no lawful heir*, — *if either of my nephews shall depart this life and leave no issue*, — *in case my said son shall die and leave no issue of his body*, — have all been construed to intend an indefinite failure of issue.

Powell, in his edition of *Fearne on executory devises*, (14) after stating a number of cases upon this subject, thus proceeds, — "The conclusion from these authorities has been, that the words *dying without leaving issue* shall have the same construction as the words *dying without issue*, in the limitation of real estates, whenever the limitation over can take effect as a remainder under that construction. It is a decision founded on the established doctrine, laid down by Sir *Matthew Hale*, in the great case of *Purefoy & Rogers*, and resorted to, recognized and proceeded upon by all the courts in many subsequent decisions."

* The devise over, therefore, can take effect only as a [* 14] remainder, since it must take effect, if at all, as a remainder by way of executory devise; and it is a well-established rule that

V. Where an estate can take effect as a remainder, it shall never be construed to be an executory devise, (15)

(9) *Target* vs. *Gaunt*. 1 *P. Will.* 432, 564. — *Eq. Abr.* 362.
(10) *Geering* vs. *Shenton*, *Cowp.* 410.
(11) *Sheffield* vs. *Lord Orrery*, 3 *Atk.* 288.
(12) *Goodtitle* vs. *Pegden*, 2 *D. & E.* 720.
(13) *Lee's case*, 1 *Leon.* 285. — *Southey* vs. *Stonehouse*, 2 *Vern.* 610. — *Daintry* vs *Daintry*, 6 *D. & E.* 314, and *Walter* vs. *Drew*, and *Goodtitle* vs. *Pegden*, before cited
(14) 2 *Fearne's Exec. Devises*, 5th *edit.* 200.
(15) *Purefoy* vs. *Rogers*, 2 *Saund.* 388. — *Wood* vs. *Baron*, 1 *East.* 259.

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VI. The words used in the will of *Ebenezer Hawley* are tantamount to those used in the fourth proposition, and should receive a similar construction.

1. This should be the construction of the words limiting the estate over upon the death of *Joseph* and *Elisha.*

It will probably be agreed, that the words *heirs of the body* are in all instances as effectual to create an estate tail, as the word *issue*, and sometimes more so; since they are the technical words of limitation; and the word *issue* is as often used as the word *children;* and is sometimes a word of purchase, when the word *heirs* would not be. (16)

Here the words are, "in case both the said *Joseph* and *Elisha* should decease," &c. One devised a messuage to *Alice*, his daughter, and her heirs, another messuage to *Thomasin*, his daughter, then eight years old, and her heirs; and if she died before she attained the age of sixteen years, living *Alice*, then he willed that *Alice* should have *Thomasin's* share to her and her heirs; and if *Alice* died having no issue, living *Thomasin*, that *Thomasin* should have and enjoy *Alice's* share to her and her heirs; and if *both daughters should die having no issue*, a devise over to *T. S.* and his heirs; and it was holden that these were estates tail, and not conditional fees. (17) If the testator then, in the case at bar, had said, *if the said* Joseph *and* Elisha *shall decease without heirs of their bodies*, it might well be conceded that the limitation over would have been on a contingency too remote. But it has been shown, that no difference exists between the words *without issue*, *without leaving issue*, and *leaving no issue;* and that the words *heirs of the body* are even less restrictive in their operation than the word *issue.* The conclusion therefore is obvious, * that "*leaving no heirs of either of their bodies begotten,*" intends an indefinite failure of issue in *Joseph* and *Elisha*, unless other words are to be found in the will, which would confine this otherwise general dying without issue to a life in being.

[* 15]

Should it be contended, that the limitation over was to persons in *esse*, and thus, in the contemplation of the testator, to take effect during a life in being, we answer, 1. That, under the word *children*, the testator's *grandchildren* might have taken, if his immediate children had been all dead. (18) And it has been determined, that a devise to children, if it be an immediate devise, relates only to

(16) *Lisle* vs. *Pullin*, 2 *Strange*, 731. — *Backhouse* vs. *Wells*, 1 *Eq. Abr.* 184. — 1 *Fearne's Ex. Dev. 5th ed.* 233.

(17) *Clatch's case*, *Dyer*, 330, *b. Barnfield* vs. *Welton*, 2 *Bos. & Pul.* 326.

(18) *Crooke* vs. *Brooking*, 2 *Vern.* 2, 107. — *Wythe* vs. *Thurlston*, *Amb.* 555. — 2 *Fearne*, 361. — *Gale* vs. *Bennett*, *Amb.* 681. — 3 *Ch. Rep.* 86.

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children in *esse* at the time; but if a devise be limited to children by way of remainder, or upon a contingency, which, in the contemplation of the testator, is uncertain when it may take place, if it ever happen at all, it is not confined to those in being at the making of the will, but includes those that are born after the testator's death. (19) 2. In many cases, where the limitation over was to one in *esse*, that circumstance has not varied the result. (20) 3. It is by no means certain, that the persons, who should be adjudged capable of taking under the word *children*, would take only estates for life.

It may possibly be said, on the authority of a note of *Douglas*, in *Doe* vs. *Fonnereau*, (21) that a double contingency may be implied; as *Douglas* says, "A double contingency, as the expression is used in that case, is where an estate in trust or by executory devise is so limited, that the time when it is to vest in possession will in one event fall within the limits allowed by law, and in another will exceed them." But it is plain that the case does not justify that definition. In a double contingency, the time will in neither event exceed the limits allowed by law. In one event it will take place as a remainder, and in the other, *viz.* the absolute failure or non-existence of a precedent estate, as an executory devisee. (22)

2. The same construction should take place in reference to the words limiting the estate to *Joseph* and *Elisha*.

* 1. As to their *immediate* estates. It has already ap- [* **16**]
peared that, had the devise been to them, their heirs and assigns, and if they died *leaving no issue*, then over, they would have taken estates tail; and that the words *leaving no heirs of the body begotten* are equipollent to the words *leaving no issue*. If, therefore, the construction of this clause be different, that difference must arise from additional words, tending to show the intention of the testator to give a fee simple, or to limit the dying without issue to a life in being.

We say, in the first place, that there are no such words tending to show the intention of the testator to give a fee simple. The use of the word *assigns* can make no difference in the construction, as appears from the cases cited under the fourth proposition, where indeed the same word is made use of, and from the case of *Scot* vs. *Smart*, before cited. In *Ellis* vs. *Ellis*, (23) Lord *Ellenborough* observed, that "as to the word *assigns*, which follows heirs, we cannot collect any different intention from the addition of it, than if

(19) *Baldwin* vs. *Karver*, *Cowp.* 314.
(20) *Wilson* vs. *Kipping*, *T. Raym.* 426. — *Chadock* vs. *Cowley*, *Cro. Jac.* 695. — *Scot* vs. *Smart*, cited 2 *Fearne*, 204.
(21) *Doug.* 504.
(22) 2 *Fearne*, 496 — *Cowp.* 314.
(23) 9 *East.* 382

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the word *heirs* alone had been used; for whether an estate be given to a man and his heirs, or to him and his heirs and assigns, must be the same thing in legal construction.

In the second place, there are no additional words in this will, which can be construed to limit the dying without issue to a life in being. Had the testator said that in case the said *Elisha* should decease, leaving no heirs of his body lawfully begotten, living the said *Joseph*, the case would be precisely that of *Pells* vs. *Brown*; (24) but then his intention would not have been expressed. He therefore very properly says, *living the said* Joseph, *or any heirs of his body lawfully begotten*, thus making the failure of issue indefinite.

It may perhaps be said, that this estate is limited over to *Elisha* upon *Joseph's* death, "leaving," &c., and the said *Elisha* or any heirs of his body *then* alive; and that *then* and *when* are [* 17] adverbs of time; and that *then* in this will * must refer to the time of *Joseph's* death. — But upon examining the case, upon which that idea was thrown out by Lord *Kenyon*, (25) and other like cases, (26) and comparing the different limitations to *Joseph* and *Elisha*, the objection, although the word *then* be used here as an adverb of time, will appear to be unfounded.

It is evident, therefore, that *Joseph* and *Elisha* took estates tail, part thereof in possession, and part in remainder after the widow's life estate.

2. What estate vested in *Joseph* upon *Elisha's* death? We answer, an estate tail; for as *Joseph* and *Elisha immediately* took estates tail, we contend that for the same and additional reasons, they took cross remainders in tail.

Testator devises *Blackacre* to *T.* and his heirs, and *Whiteacre* to *F.* and his heirs. *Item. I will that the survivor of them shall be heir to the other. T.* and *F.* took cross remainders in tail. (27) Devise of all my lands in *M.* unto my two daughters *E.* and *A.* and their heirs equally to be divided; and in case they happen to *die without issue*, then over: held that *E.* and *A.* have cross remainders. (28) So where *A.* seised of lands had issue, two sons, and devised part to his eldest son in tail, and the other to his younger in tail, with this clause in the will, "that if *any* of his said sons died *without issue*, that *then* the *whole land* should *remain* to a stranger in fee." It was adjudged that upon the younger son's dying without issue, the eldest son should have the land by implication. (29) In the case at bar, the words are, "In case both should

(24) *Cro. Jac.* 590.
(25) *Wilkinson* vs. *South*, 7 *D. & E.* 557.
(26) *Ellis* vs. *Ellis*.
(27) *Chadock* vs. *Cowley*, *Cro. Jac.* 695.
(28) *Holmes* vs. *Meynell*, *Th. Jones*, 172.
(29) 4 *Leon.* 14, cited in Sir *T. Raym.* 454

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decease, &c., *then all the lands* herein before given to them, the said *I.* and *E.*, shall be and *remain*," &c.: and it has frequently been decided, that wherever cross remainders are to be raised by implication between two and no more, the presumption of law is in favor of cross remainders. (30)

But here the cross remainders are express. The estate was to continue in *Joseph* and *Elisha*, and the heirs of their bodies, so long as any of them were in being, and no part of it was to go over until a failure of issue in both. Should * it be de- [* 18] termined, that the testator gave a fee simple to *Joseph* and *Elisha*, and afterwards, upon *Elisha's* death, a fee simple to *Joseph* in *Elisha's* share, the devise must be read thus, — "If *Elisha* shall die, leaving no heirs of his body begotten, living *Joseph* or any heirs of his body begotten, the land given to *Elisha* shall be and remain, by executory devise in fee simple, to *Joseph*, if alive, but if *Joseph* should be dead, and any heirs of his body alive, *Elisha's* part shall be and remain, by executory devise in fee simple, to the heirs of the body of *Joseph*. And if the said *Joseph* shall die," &c., in the same manner. Such cross executory devises were never heard of; and the mere statement of the case must show that these are cross remainders. Besides, had the testator intended an executory devise, he would not in every instance have used the word *remain*, (31) but another word, expressing a different idea.

Should it be objected that, as, in case of *Joseph's* failure of issue, the testator directs that *all the devises and bequests of real estates shall be*, &c., to the said *Elisha or* such his said heirs, this furnishes an argument, that the *children* of *Elisha* would have taken a fee simple by purchase, we reply, that the plaintiffs in error can have no possible interest in this objection; since, were the estate given to *Joseph* but a life estate, the limitation over upon *Joseph* and *Elisha's* dying, *leaving no heirs of either of their bodies*, would enlarge that estate for life to an estate tail; and if the words "*all the devises*," &c., or, rather, "all the lands," would carry a fee, the plaintiffs are claiming by virtue of an executory devise, so constructed, as to vest, if at all, after an indefinite failure of issue. But there is no ground for making it, since the word *or* is frequently taken as the word *and;* (32) and it is believed that no case can be found, where, after a limitation to the ancestor for life, either in possession or expectancy, the words *heirs of the body* have been so construed, as to give such heirs of the body of such ancestors

(30) *Perry* vs. *White*, *Cowp.* 780. — *Phipand* vs. *Mansfield*, *Cowp.* 800.
(31) *Goodright* vs. *Cornish*, 1 *Salk.* 226.
(32) *Soulle* vs. *Gerard*, *Cro. Eliz.* 525. — *Pain* vs. *Mallary*, *Ibid.* 832. — *Richardson* vs. *Spraag*, 1 *P. Will.* 434. — *Brownsword* vs. *Edwards*, 2 *Vez.* 243.

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[* 19] an estate by purchase; unless * words of limitation were superadded by the will, or unless the words *heirs of the body* were so qualified by subsequent words, as necessarily to intend first and other sons, &c. (33) In this case there are no such qualifying and explanatory words, and *heirs of the body* must therefore be considered words of limitation, and not of purchase.

But even upon the plaintiffs' own hypothesis, that the devise to *Elisha* was a fee simple, the demandant, as to his share, could take nothing by the will; for after the death of *Elisha* and the widow, the share given to *Elisha* vested in possession in *Joseph*, either in fee simple or in fee tail; — if in fee simple, the estate became alienable; — if in fee tail, the remainder over has been defeated by the common recovery suffered by *Joseph*; — since it is a rule of law, that

VII. Where an executory devise, carrying the whole or a part of the fee, becomes vested, all subsequent limitations at the same time cease to be executory, and become void or vested in interest.

For many years after the introduction of executory devises, it seems to have been holden, that an executory devise, to take place after a pending executory devise, which would carry the whole interest, was void. (34) But it was afterwards settled, that wherever the limitation of a particular estate, as for life or in tail, vests by executory devise, the subsequent limitations at the same time vest in interest, cease to be executory devises, and become mere vested remainders; and that "whatever number of limitations there may be after the first executory devise of the whole interest, any one of them, which is so limited that it must take effect, if at all, within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding executory limitations, which would carry the whole interest, happens to vest. But when once any preceding executory limitations, which carries the whole interest, happens to take place, that instant all the [* 20] subsequent limitations become void, * and the whole interest then becomes vested." (35)

As to *Elisha's* share therefore, the plaintiffs have no claim to recover, either by virtue of an executory devise, or a remainder after an estate tail in *Joseph*.

The Court will without doubt give a liberal construction to wills; and so far as the testators have expressed themselves clearly, or as

(33) *Fearne*, 227. — *Long* vs. *Laming*, 2 *Burr.* 1101.

(34) *Backhouse's case*, *Pollexf.* 33. — *Burgis* vs. *Burgis*, 1 *Mod.* 115. — *Goodright* vs *Cornish*, 4 *Mod.* 255, 284.

(35) *Stephens* vs. *Stephens*, *Ca. Temp. Talb.* 238. — *Hopkins* vs. *Hopkins*, *Ibid*, 44. *Brownswoord* vs. *Edwards*, 2 *Ves.* 243. — *Higgins* vs. *Dowler*, 1 *P. Will.* 98. — *Doe* vs *Fonnereau*, *Doug* 487. — 2 *Fearne*, 415. — 2 *Will. Saund.* 388, *h.*

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their intentions can be gathered from the words they have used, so far the Court, if it can be done consistently with the rules of law, will effectuate those intentions. In *Dacre* vs. *Dacre*, (36) though Justice *Buller* differed from the rest of the court as to the meaning of words used, yet in the general principle, as above stated, the court agreed in opinion. But it by no means results from that principle, and indeed it would be inconsistent with it, that courts of justice should give to such words a forced construction, in order to carry into effect what they may *conjecture* to be the intention; and, as was said by the dissenting judge in the case above mentioned, as the question what was his intention in a particular case has not been expressly asked of the testator, unless his intention be expressed by the words he has used, it is but *conjecture* what would have been his answer. If the language of the testator be obscure, the whole will must be examined, and such a construction given to the words used, as will support the general and legal intent. (37) In the present case we contend that the testator has expressed himself not only with almost technical precision, but by words, to which, when unexplained by other words, frequent decisions for more than a century past have affixed a determinate meaning; and that the general intention of the testator would be carried into effect by giving to those words the construction they would naturally and legally receive.

It is true it may be objected to the construction we contend for, that the testator could never have intended an estate, which would descend to the eldest son in exclusion of the other children; but it may be replied with equal * confidence, that [* 21] neither could he have designed such an estate as would be defeated in its subsequent limitations, in case *Elisha* had died leaving one child, which had survived him but an hour. This is not matter of conjecture, but of certainty; and the will must be construed at the moment of the testator's death. (38) His intention undoubtedly was to preserve the estate in the family; and after the enjoyment of it by one branch, till that was spent, to return it to the possession and enjoyment of the remaining branches.

In relation to the general policy of executory devises, it is presumed that, had the distribution and liability of the estates of deceased persons been immemorially the same in *England* as in this country, they would never have been carried to their present extent. They have originated principally in local ideas of convenience, and have grown up in that country, for the most part,

(36) 1 *Bos. & Pul* 250. (37) *Thelusson* vs. *Woodford*, 4 *Bos. & Pul* 64
(38) *Doe* vs. *Fonnereau*, *Doug* 476.

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since the settlement of this; but they are frequently spoken of as inconvenient estates, (39) and are admitted with great caution, and only in cases of necessity. (40)

Bliss. The plaintiffs in error say that, upon the special verdict found upon the *venire facias de novo*, judgment ought to be rendered for them, either as devisees under the will of *Ebenezer Hawley*, or as heirs at law of the said *Ebenezer*, or of *Elisha Hawley*.

They principally rely upon their title under the will, that thereby a proper executory devise was made to the original demandant, the devisor departing with the whole *fee simple*, and, upon the happening of a certain event, limiting the estate to them. A fee simple was given to *Joseph* and *Elisha*, determinable upon certain events, which have happened.

The fundamental rule in construing wills is, that the intention of the testator must be pursued, unless that intention contradicts a plain rule of law; (41) the meaning of which is, that it must not be such a limitation as the law does not allow, but not that [* 22] the words must be taken precisely * in that sense which the law generally gives them. (42) If this is a governing rule, the original demandant was entitled; for it would be impossible for a man of plain common sense to read the will, and avoid the conclusion that the testator meant that he should have the estate if *Joseph* and *Elisha* left no children when they died, — especially in this country, where estates tail are much less frequent than in *England*. And every lawyer, whose head was not filled with contingent and cross remainders, would be of the same opinion. The devise is a plain, correct, and even technical construction of a fee simple. It would be valid in a deed, and much more in a will, to effectuate the intent of a devisor. Is, then, the intention of the devisor, in the after limitations, contrary to any plain, fixed principles of law?

The after restrictions do not alter the nature of the estate first given, but declare that, upon the happening of a certain event, it should cease. They direct when the ulterior devise shall take effect, but do not change the precedent estate. An express estate, according with the intent of the devisor, ought not to be changed by implication. (43) The cases cited in the margin all show, if it needed authorities, that the first taker had a fee simple, and not a fee tail,

(39) *Scatterwood* vs. *Edge*, 1 *Salk.* 230.
(40) *Luddington* vs. *Kime*, 1 *L. Raym.* 208.
(41) *Loveacres* vs. *Bright*, *Cowp.* 355. — *Dacre* vs. *Dacre*, 1 *Bos. & Pul.* 256. — *Ginger* vs. *White*, *Willes*, 349. — *Doe* vs. *Halley*, 8 *D. & E.*
(42) *Fearne's Ex. Dev.* 5th edition, 206, and *Powell's note thereon.*
(43) *Doe* vs. *Perryn* 3 *D & E.* 490 493

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and that the devise over was a proper executory devise. (44) Had the first devise been of a plain, express estate tail, perhaps the result from the authorities would have been different. (45)

As executory devises cannot be barred by a common recovery, two rules have been adopted, which the plaintiffs in error are not disposed to controvert. The first is, that if a contingent estate be limited to depend upon a freehold, which may support a remainder, it shall be construed a remainder, and not an executory devise; (46) but even this rule may be set aside, when the manifest intent of the testator contradicts it. (47) The second rule is, that an executory devise shall be void if it be not limited to take effect within a life or lives in being, and twenty-one years and the time allowed for gestation. (48)

* The devise over to *Joseph*, in the event which has [* **23**] happened, is a valid executory devise, and is not affected by the first rule. Indeed, there is a small part of the property wherein a life estate was given to the testator's widow, but there is a clear devise of a fee simple after it, and the contingent limitations depend not on the life estate, but on the fee simple; so that the rule does not apply to the case, (49) and the ulterior devise is limited to defeat the estate given before, and cannot be supported by it. (50) The limitation over is to take effect within the time prescribed by the second rule. This is the case with the devise over to *Joseph*, which is clearly limited to take effect at *Elisha's* death: *If Elisha decease leaving no heirs, &c., living Joseph.* The phrase seems to have been adopted in conformity to the leading case of *Pells* vs. *Brown.* (51) The cases cited all show that there can be no technical rule of law to prevent the devise being taken in its obvious sense, and limiting it, according to the intent of the devisor, to the time of *Elisha's* death. A late case, of *Doe* vs. *Ellis*, (52)

(44) *Pells* vs. *Brown*, *Cro. Jac.* 590. — *Hanbury* vs. *Cockrill*, *Roll. Abr.* 334. — *Heath* vs. *Heath*, *Bro. Ch. Rep.* 148. — *Doe* vs. *Welton*, 2 *Bos. & Pul.* 324. — *Gulliver* vs. *Wicket*, 1 *Willes*, 105. — *Porter* vs. *Bradley*, 3 *D. & E.* 143. — *Roe* vs. *Jeffery*, 7 *D. & E.* 589.

(45) *Spalding* vs. *Spalding*, *Cro. Car.* 185. — *Driver* vs. *Edgar*, *Cowp.* 375

(46) *Purefoy* vs. *Rogers*, 2 *Saund.* 388. — *Doe* vs. *Morgan*, 3 *D. & E.* 763.

(47) *Fearne's Ex. Dev.* 206. — *Doe* vs. *Fonnereau*, *Doug.* 474.

(48) *Thelusson* vs. *Woodford*, 4 *Bos. & Pul.* 357. — 2 *Wils.* 213. — 7 *D. & E.* 102. — *Duke of Norfolk's case*, 3 *Cha. Ca.* 11.

(49) *Fearne's Ex. Dev.* 17, 19.

(50) *Gulliver* vs. *Wicket*, 1 *Wils.* 105. — *Fearne*, 20. — *Roe* vs. *Jeffery*, 7 *D. & E.* 589. — *Doe* vs. *Walton*, 2 *Bos. & Pul.* 324.

(51) *Porter* vs. *Bradley*, 3 *D. & E.* 143. — *Roe* vs. *Jeffery*, ubi supra. — *Dyer*, 127 *a*, in margin. — *Goodright* vs. *Searle*, 2 *Wils.* 29. — *Hockley* vs. *Mawbey*, 3 *Bro. Ch. Rep.* 81. — *Wilkinson* vs. *South*, 7 *D. & E.* 555.

(52) 9 *East's Rep.* 386. — *Bigge* vs. *Bensley*, 1 *Bro. Ch. Rep.* 190.

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mentions that Lord *Thurlow* had decided that *dying without issue* did not mean the same thing as *dying without leaving issue.*

There have been some cases which have construed the same words, when applied to real and personal estate, in a different way; (53) but it is contended that, after examining all the cases on the subject, the apparent intent of the devisor will govern in both. *Fearne* and *Powell*, his editor, both contend that they mean the same thing. (54) *Dying without issue* generally means, in both, an indefinite failure of issue, but may be explained by any circumstance showing the testator's intent to confine it to the time of the death. The words *heirs of the body begotten* are equivalent to *issue* or *children*, and are descriptive of the persons who are to take. If they have a different meaning, they are limited, by the phrase "*living Joseph*," to his life. The words *children*, *heirs*, *heirs male*, *heirs of the body*, may be taken as words of purchase, to carry into effect the devisor's intent. (55)

[* 24] * But if the devise over to *Joseph* is void because the contingency is too remote, still the ultimate devise over to the original demandant is valid, and within the time prescribed by law. It is essentially the same with the cases of *Pells* vs. *Brown*, *Porter* vs. *Bradley*, and *Roe* vs. *Jeffery*, before cited. In the first, it was *dying without issue living W.*; in the second, *if he happen to die leaving no issue behind him*; and in the third, *if he depart this life, and leave no issue, then* to *B.*, *M.*, and *S.*, or the survivor of them. These were all holden to be valid executory devises, but neither of them is so strong as the case at bar. None of them united the two circumstances of the expression *leaving no issue*, and *the living of the devisee* over, at the time the devise was to take effect. The expressions are not merely if they die *without issue*, then to my brother's and sister's children who shall then survive; — but if they decease leaving no heirs, &c., then to the children of my brother and sister who shall then survive. The word *leaving* has no technical meaning annexed to it. In its natural import, it would certainly relate to the time of decease; but all possible ambiguity is done away, in this case, by the phrase *children*, &c., *who shall then survive.* The word *children*, ordinarily, does not mean *grandchildren*; but the words *who shall then survive* define the persons most precisely. They must have lived with the first devisees, and must have outlived them, and be alive at the time

(53) 1 *P. Will.* 664. — 3 *P. Will.* 259.

(54) *Fearne*, 259, 260, 261, note *a.* — 2 *Will. Saund.* 388, note *k.* — *Toovey* vs. *Basset*, 10 *East's Rep.* 460.

(55) *Willes's Rep.* 592. — *Doug.* 264. — 2 *Burr*, 1100. — *Goodtitle* vs. *Herring* 1 *East's Rep.* 264.

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of the happening of the contingency. So that the candles were lighted, and all burning at the same time, as has been said to be necessary to make a valid executory devise.

It may be said that, upon the devise over to *Joseph* upon *Elisha's* death, his part of the estate became vested, and the subsequent limitations also became vested remainders. If this position were true, it would affect only a part of the estate; and as to the residue, the judgment is wrong, and the demandant was entitled to recover it. But the plaintiffs in error contend that the principle does not apply to any part of the estate,

* 1. Because the limitation over to *Joseph* is so remote, [* 25] and in that respect plainly distinguishable from the last devise.

2. Because the devise to the original demandant was an entirely independent executory devise.

The devise to *Joseph* could in no sense support the after devise, and the after devise was no way dependent on the devise to *Joseph.* He would have no greater control over the last devise than before, unless he was tenant in tail in possession. The time when it was ascertained whether *Joseph* had heirs was not the time of the vesting of the first executory devise, and therefore the principle does not apply. (56) The persons must then be ascertained, as well as in *esse.* Where one preceding limitation vests, which carries *the whole interest,* the subsequent limitations become void; (57) but if the devise over to *Joseph* were for life only, the whole interest not being devised, the other devises remain executory; and if the devises were void, on this supposition, *Joseph* was only tenant for life, and his suffering a common recovery could not enlarge his estate, or bar the demandant's claim as heir at law of *Ebenezer.*

This case may be decided upon the principle of a contingency with a double aspect, being to take effect in one way upon one event, and in another way upon a different event; and in the event which has happened, the devise must take effect as an executory devise. (58) In addition to the cases already cited, those mentioned in the margin show that it is a good executory devise to the demandant. (59) So also does the case of *Fosdick* vs. *Cornell,* (60)

(56) *Fearne's Ex. Dev.* 369, 370

(57) *Ibid.* 464. — *Stephens* vs. *Stephens, Cases Temp. Talbot,* 228.

(58) *Hopkins* vs. *Hopkins, Cases Temp. Talbot,* 44. — *Brownswoord* vs. *Edwards* 2 *Ves.* 243. — *Doe* vs. *Fonnereau, Doug.* 487. — *Baldwin* vs. *Carver, Cowp.* 309. — *Statham* vs. *Bell, Cowp.* 40.

(59) *Hoe* vs. *Gerrils, Palm.* 136. — *Duke of Norfolk's case,* 1 *Eq. Abr.* 188. — *Vaugh* 272. — *Gardner* vs. *Sheldon, Bac. Abr. Uses and Trusts, G.* — *Miller* vs. *Moor, Barn.* 7, 9. — 1 *Sid.* 148. — 3 *Bro. Ch. Rep.* 82. — *Richardson & Ux.* vs. *Noyes,* 2 *Mass. Rep* 56. — *Rex* vs *Marquis of Stafford,* 7 *East,* 521, 526, 527.

(60) 1 *Jo.* vs. *Rep.* 440.

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decided in *New York*, where a testator gave his real and personal estate to his four sons and his daughter, and then says, If any of my sons or my daughters happen to die without heirs male of their bodies, the lands devised should return to the survivors, to be divided. This was adjuged a good executory devise of the fee to the survivors.

[* 26] * But, admitting that the conditions annexed to the first devise of the fee to *Elisha* and *Joseph* are void, and that, in consequence, they took a fee simple, the plaintiffs in error are entitled to a share in *Elisha's* part, according to the verdict, as heirs at law of *Elisha*; and if the devise over to *Joseph* was only for life, they will take as heirs at law of *Ebenezer Hawley*.

In reply to the argument for the defendants in error, it is admitted that words carrying a fee may, by subsequent words, be so restrained as to make it a fee tail. But it is answered, that this never ought to be done in the case of a will, when it is contrary to the intent of the testator; and with this principle all the adjudged cases may be reconciled. The cases cited, where there was a plain estate tail first, do not at all compare with the case at bar, and may be sound law. (61) In many of the cases cited for the defendants, there was a clear life estate first given, which would support the remainder. (62) In some others, the question was merely whether more than a life estate was first given: (63) so whether a devise to one and his heirs, with a limitation to a collateral heir, is not void. In some cases, to effect the intent of the devisor, it may be construed an estate tail; but in others, for the same purpose, it may be construed an executory devise. (64) Several of the cases went upon the ground that the limitation was after an indefinite failure of issue; and where this is clearly the case, the devise over must be void.

In addition to the answer already given to the distinction insisted upon between real and personal estate, it is to be observed, that from the cases, it is doubtful whether it exists in *England*. But in this state, where devises apparently made of both, if they are void as to one, are void as to both, and where intestate estates, both real and personal, generally descend alike, the distinction ought not to be adopted.

The defendants' counsel must be hardly pressed, to be obliged to

(61) *Gerring* vs. *Shenton*, *Coup.* 410. Vide *Ginger* vs. *White*, *Willes*, 348, and the doctrine laid down, 350. — *Driver* vs. *Edgar*, *Coup.* 379. — *Daintry* vs. *Daintry*, 6 *D & E.* 307.

(62) *Chadock* vs. *Cowley*, *Cro. Jac.* 695. — *Webb* vs. *Herring*, *Cro. Jac.* 416.

(63) *Goodright* vs. *Pullen*, 2 *L. Raym.* 1437. — *Doe* vs. *Holmes*, 3 *Wils.* 241, and *Barnard* vs. *Reason*, there cited.

(64) *Nottingham* vs. *Jennings*, 1 *L. Raym.* 568. — *Morgan* vs. *Griffiths*, *Coup.* 234 *Doe* vs. *Perryn*, 3 *D. & E.* 484.

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contend that the devise over to *Joseph* was a good devise, and the subsequent limitation void.

* If the defendants can show clearly that *Joseph* and [* 27] *Elisha* took immediate estates in tail, then perhaps it might be argued, that to effect the intent of the devisor, they might take cross remainders in tail. (65)

But as we contend the first estate was in fee, to raise up cross remainders between them would not only be wholly unnecessary, but would plainly defeat the testator's intention. Neither can there be any foundation for altering the devises, to carry that intention into effect. There are no general and particular intent, which are at variance. *Elisha* and *Joseph* enjoyed the estate as long as the testator designed that they should; that is, during their lives only, if they left no children.

What the testator would have said, if the very *improbable* event of one of them having left a child, and that child dying in infancy, had happened, we cannot now tell. And there is no occasion to make a will for him on that account. It will be time enough to argue and decide such a case, when it shall arise. It is enough for us to know that, as the case has happened, he designed to have the estate go to his other nephews and nieces, if *Joseph* and *Elisha* left no children; and every attempt to prevent this is in direct opposition to his express intentions.

Strong, in reply. The cases cited for the plaintiffs in error are, in general, we conceive, entirely reconcilable with the positions laid down for the defendants in the opening. In some instances they go directly to support them; and in others, where at first they seem to be contradictory to the authorities we have produced, they will be found, upon examination, to comport with them, and to have been founded upon the principles which we press upon the consideration of the Court. Thus, in attempting to show that the immediate devises to *Joseph* and *Elisha Hawley* were in fee, and the limitations over upon their failure of issue confined to the period of a life in being, the counsel for the plaintiffs points to the case of *Pells* vs. *Brown*, the great *Magna Charta*, as Lord *Kenyon* called it, * of this branch of the law; but it need not be [* 28] mentioned, that with respect to the authority of that case, there can be no dispute between us; although it remains to be shown, that the leading features of that case are visible in this.

In *Hanbury* vs. *Cockerill* the lands were devised to the survivor, in case either should die *unmarried* or *before twenty-one years without issue*; both of which events must have been determined within

(65) 1 *Saund.* 185, *b. William's note*, 6. — *Watson* vs. *Foxon*, 2 *East*, 36.

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the compass of lives in being. In *Heath* vs. *Heath*, the devise over was, if *C.* should die *without son or sons who should attain the age of twenty-one years.* The words *son or sons* evidently intended first and other sons, the immediate descendants of the father, and upon their attaining the age of twenty-one years the devise over is defeated. *Doe* vs. *Wetton* is precisely within the principle, and nearly in the words of *Pells* vs. *Brown.* In *Gulliver* vs. *Wicket* the child of *K.* must have attained the age of twenty-one or not. If he did, the devise over was defeated; if he did not, and left issue, it was also defeated. If in that case he left no issue, the devise over would vest seasonably, and so was good. In *Porter* vs. *Bradley*, the words were these — "If my said son should happen to die, *leaving no issue behind him;*" and the court held that the dying without issue was restricted to a life in being. And the words *behind him* perhaps would naturally enough intend this restriction. But the suggestion of Lord *Kenyon*, that the distinction taken in *Forth* vs. *Chapman* was not founded in reason, was a mere *obiter dictum*, without influence in that or any subsequent case. The correctness of that distinction, however originating or founded, was afterwards recognized by Justice *Buller*, in *Comberbach* vs. *Perrin*, (66) and by Lord *Kenyon* himself, in *Daintry* vs. *Daintry.* In *Roe* vs. *Jefferey*, Lord *Kenyon* said he had given no judicial opinion in *Porter* vs. *Bradley*, respecting the distinction taken in *Forth* vs. *Chapman;* and Justice *Lawrence*, in *Everett* vs. *Cook*, (67) declared that Lord *Kenyon* had never denied that distinction to be law. *Fearne*, (68) after remarking, [* 29] in relation to * the case of *Porter* vs. *Bradley*, that there is great reason to believe that the words *behind him* were much relied upon in the decision, says, "It is impossible to reconcile one's self to a supposition, that the court would, without such a ground of distinction, have dismissed all attention to the antecedent decisions upon the point." And *Powell* (69) observes, with considerable warmth, that "If we now decide that the words *leaving no issue*, as applied to real property, are not to be received in a different sense from those words, as applied to personal property, namely, as implying a general failure of issue, we shake every title, in which that circumstance has occurred, from the period in which *Forth* vs. *Chapman* was determined, down to that in which the case of *Porter* vs. *Bradley* occurred," a period of nearly eighty years. It is not easy therefore to conceive, that the extrajudicial remark of Lord *Kenyon*, which his cooler judgment must have censured as unguarded and useless, will be suffered in any degree to influence the Court.

(66) 3 *D. & E.* 494.
(67) 7 *D. & E.* 271.
(68) *Page* 211
(69) *P.* 258.

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In *Roe* vs. *Jefferey*, the principal ground of decision seems to have been, that the limitations over were to persons in *esse* and of life estates. Neither of those circumstances is discerned to be in this case; certainly not the first.

But it is said, there is really little matter of dispute between us; since, according to Lord *Ellenborough*, in *Doe* vs. *Ellis*, Lord *Thurlow* declared in *Bigge* vs. *Bensley*, that there were not less than fifty-seven cases upon this point, and that to call *dying without leaving issue* the natural sense of *dying without issue*, was against all the cases! But how is this declaration to be understood, and for what purpose was it referred to by Lord *Ellenborough*? The counsel for the plaintiffs in error would have it understood that Lord *Thurlow* was speaking generally, as well of limitation of freehold estates as chattel interests. But his observations were confined to devises of personal property. In *Forth* vs. *Chapman* it had been decided that * dying *without leaving issue* intended, in [* 30] the case of a term, a dying without issue at the time of the death; and it was subsequently holden that the words dying *without issue* intended a like restriction. But his lordship censures this doctrine, and says that to say in cases of personal property a dying *without leaving issue* is the natural sense of dying without issue, is against all the cases. Lord *Ellenborough* then, in a case of freehold estate, when the general words *dying without issue* were used by the testator, might with much propriety, after stating that these words intended an indefinite failure of issue, refer to this declaration of Lord *Thurlow*, as proving that even in the case of personal estate they would receive that construction.

The same observations may be made as to the opinions of *Fearne* and *Saunders*, referred to by the counsel for the plaintiffs. So far from insisting that the words *without leaving issue* or *leaving no issue*, in the case of freehold, denote a failure of issue without the period of a life in being, they merely contend that the words *without issue*, in the case of a term, should *ex vi termini*, unless other words are introduced to vary the construction, be considered as intending an indefinite failure of issue.

The case of *Wilkinson* vs. *South* turned upon the words dying *without issue*, it being the devise of a term.

As to the case of *Fosdick* vs. *Cornell*, cited from the *New York* reports, it may be at once answered, that if the case were decided *entirely* upon common law principles, and the decision were not founded on the nature of the estate limited over, and the persons in whom it was to vest, it is not, in our apprehension, notwithstanding the present distinguished character of the courts of that state supported by a single authority in the *English* books.

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The only remaining case now recollected which seems to have any bearing upon the present question is that of *Richardson & Ux.* vs. *Noyes.* Whether that case was or was not correctly decided, it is sufficient for our purpose that two principal grounds for the opinion of the court were, that the testator could not have
[* 31] intended an estate which would * descend to the eldest son, in exclusion of the other children;—and that the real and personal estate being limited over upon the same contingency, the nature of the personal estate devised denoted the obvious intention of the testator to confine that contingency to a life in being. Now, as to the first circumstance, if it were to be taken as a distinct ground of decision the argument would prove too much, since any estate tail, arising by implication, however strong, or even created by express terms, would be liable to the same objection;—and the second ground renders that case obviously distinguishable from this.

We see no reason, therefore, to doubt the correctness of the positions we before laid down, as to the effect of words denoting a failure of issue.

But it is said that in this will there are words which, if unrestrained, would carry a fee; and that where a fee is created by positive words, it can be defeated only by subsequent words equally plain, or by necessary implication. This, however, is saying nothing, as we have all along contended that the cases cited have decided an estate tail to be necessarily implied when a man devises an estate to one and his heirs, and limits it over to a third person upon the second dying without issue. But separate from the words "*leaving no heirs of his body,*" the extent of the devise itself is in this case *restricted* and *limited* expressly.

Again, it is urged that by the expression "*to such of my brother's and sister's children as shall then survive,*" the dying without issue is confined to the time of the death; since the word *survive* must intend that the person who is to take should be living with the testator, and outlive the rest of the children. But this is clearly incorrect. To *survive* means simply to remain in life after the death of another; and without a solecism, a man who had no children might well enough devise to such of his descendants as should survive at the termination of the present century.

The counsel for the plaintiffs has suggested that these are
[* 32] exceptions to the propositions stated in *Purefoy* vs. * *Rogers*, relative to limitations vesting as remainders in all possible cases. The true rule may be that when, upon a fair construction of the will, it appears to be the intent of the testator to limit an estate over, upon any contingency, after a precedent freehold

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capable of supporting a remainder, such limitation over shall operate by way of remainder, and not as an executory devise. But *Fearne*, in saying that the rule as stated in *Purefoy* vs. *Rogers* may be overruled, means only to say that the rule is not to be applied until the intent be discovered; not that an executory devise may in any case take effect as such, where there is a freehold capable of supporting the devise as a remainder. Such a species of executory devises would be altogether anomalous.

In relation to the objections urged against the limitations over being defeated upon the vesting of *Elisha's* share in *Joseph*, we see no reason to vary the position we have before taken. It was once holden that any limitation after an executory devise of the *whole interest* was absolutely void; but it was afterwards ruled that until such executory devise vested, the subsequent limitation was good. In the event of the first failing, the second would take effect. But when the first limitation *vests*, the old principle becomes applicable; and it is believed that no case can be found, in which it is decided that the last limitation continues to exist after the first, which carries a fee, has vested. It is perfectly immaterial whether the second be remote or independent. Such is the established rule in all cases; and there is not, we believe, a single *dictum* against it.

The intention of the testator, if it be consistent with the rules of law, will without doubt be carried into effect. But whether certain words shall in all cases receive the same construction, when no other words are introduced to vary that construction, there can equally be no question. Were it otherwise, instead of the hardships which would result, as Lord *Mansfield* said, to the profession, if the * law were so *certain* that every body knew [* 33] it, the whole community might be incommoded by its being so *uncertain* that nobody could know it.

The principal questions presented to the consideration of the Court in this case have been once solemnly determined after repeated arguments, by the highest judicial tribunal in the commonwealth, and we have reason to believe that the present Court will not, without substantial reasons, declare the unanimous opinion of their predecessors erroneous. It is of the utmost importance that titles which have been once adjudged good should not unnecessarily be again brought into dispute, and if they are, that known and long established principles of law should be adhered to with strictness in the investigation. Lord *Parker* observed, in the case of *Goodright* vs. *Wright*, (68) that altering the settled rules concerning property was the most dangerous way of removing landmarks; and *Fearne*, in his comment on the celebrated case of *Perrin* vs. *Blake*, after

(68) 1 *P. Will.* 399.

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remarking the uncertainty which would attend all titles, until formally examined by a court of justice, in case the rules of law were to ebb and flow with the taste of the judge, and the fashion of the times, thus proceeds: "Nay, even a decision of a court of justice, upon the very identical title, would be nothing more than a precarious temporary security; the principles upon which it was founded might, in the course of a few years, become *antiquated;* the same title might be again brought into dispute; the taste and fashion of the times might be improved; and on that ground a future judge might hold himself at liberty (if not consider it his duty) to pay as little regard to the maxims and decisions of his predecessor, as that predecessor did to the maxims and decisions of those who went before him."

The judges having conferred together on this cause during the vacation, the chief justice drew up the result; and being detained from attending at this term by bodily indisposition, transmitted that result to his brethren here, * which was now pronounced by PARKER, J., as follows; the parties expressing a strong desire for the decision of the cause, and *Sedgwick*, J., sitting *pro formâ*, having been of counsel in the original action.

[* 34]

The plaintiffs, as the children and heirs of *Moses Hawley*, have sued this writ, to reverse a judgment rendered against their ancestor at the term of this court holden in this county in May, 1792. The judgment was rendered upon a writ of *entry sur disseisin*, sued by the said *Moses*, in which he counted upon his own seisin in fee, and on a disseisin committed by the defendants in their corporate capacity. The writ demanded eight several parcels of land, and one third part in common of five other parcels of land, formerly the estate of *Ebenezer Hawley*, deceased. On a trial upon the general issue, the jury found a special verdict, on which judgment was rendered for the defendants.

On inspecting the record, it appeared to the court that the defendants derived their title under a devise from *Joseph Hawley*, who, as they argued, had been seised in fee tail, and had suffered a common recovery to his own use in fee; but the verdict did not find that the recovery had been executed. On mentioning this defect, the defendant's counsel produced a record of the execution of the recovery; and thereupon the court recommended to the parties to adopt some method by which the execution might appear on record as a fact found.

This recommendation was made on the authority of the case of *Witham* vs. *Lewis*. (69) In this case it was holden by the highest judicial authority, that no uses were raised by the suffering of a

(69) 1 *Wils.* 48. — 2 *Strange*, 1185, *S. C.* — 4 *Bro. P. C.* 504, *S C*

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common recovery, unless the same was executed; and that the uses arose from the execution.

The parties, therefore, desirous to have the cause decided on its merits, agreed that the judgment should be reversed, and that a *venire facias de novo* should be ordered. On a new trial, pursuant to such order, the jury have again found a special verdict; and what judgment is to be rendered *on that verdict, is [*35] the great question before the Court.

The verdict substantially finds, that *Ebenezer Hawley*, on the 29th of July, 1751, was seised in fee simple of the tenements demanded; that he then made his will, and afterwards, on the 18th of August, 1751, died so seised; that by his will he devised some portion of the tenements to his wife *Bethiah* for life; that he devised the residue, including the remainder expectant on his wife's death, to his nephews *Elisha Hawley* and *Joseph Hawley*, but severally and in distinct parts, to have and to hold the parts devised to *Elisha, to him, his heirs and assigns forever, on the conditions and limitations after in his will mentioned;* and to have and to hold the parts devised to *Joseph, to him, his heirs and assigns forever, on the conditions and contingencies after mentioned in his will.* The testator then proceeds — "And it is my will and pleasure, and I have made the foregoing devises and bequests with the provision and limitation that, if it should so happen that the said *Joseph* should decease, *leaving* no heirs of his body lawfully begotten, and the said *Elisha, or any heirs by him the said* Elisha *lawfully begotten*, then alive, that in such case all the devises and bequests of real estate herein before made to the said *Joseph* should be and remain to him the said *Elisha or such his said heirs.* And in case the said *Elisha* should decease, *leaving* no heirs of his body begotten, living the said *Joseph or any heirs of his body lawfully begotten*, in such case, all the lands herein before devised to the said *Elisha* shall be and remain to the said *Joseph* or such his said heirs. But in case both the said *Joseph* and *Elisha* should decease, leaving no heirs of either of their bodies begotten, then all the lands herein before given to the said *Joseph* and *Elisha*, or either of them, *shall be and remain to the children of my brethren and sister who shall then survive.*"

The verdict further finds, that on the death of the testator *Ebenezer*, his widow and his nephews *Elisha* and *Joseph [*36] respectively entered into and became seised, as the law requires, of the several estates devised to them; — that afterwards, on the 24th of September, 1755, the said *Elisha* died seised, without leaving any heirs of his body, the said *Bethiah* and *Joseph* being then alive; — that on his death, the said *Joseph* entered into the estate that had been so devised to the said *Elisha*, and became seised there-

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of, as the law requires; — that afterwards, on the 2d of March, 1781, *Bethiah*, the widow, died, and the said *Joseph* thereupon entered into and was seised of the estate devised to her for life, as the law requires; — that afterwards, on the 10th of March, 1788, the said *Joseph* died without any heirs of his body, leaving nine cousins, the children of the brethren and sister of the testator, of whom *Moses Hawley*, the father of the plaintiffs in error, was one, who, on the said *Joseph's* death, were his heirs at law, and also the heirs at law of the said *Ebenezer*, the testator.

The verdict further finds, that the said *Joseph*, at a Court of Common Pleas holden for this county in August, 1783, being then seised of the tenements aforesaid, and claiming to hold them as an estate tail, suffered a common recovery thereof, in due form of law, to his own use in fee simple, which recovery was duly executed; — that afterwards, in September of the same year, the said *Joseph*, then seised of the tenements, as the law requires, made his will, executed in due form of law, which since his death has been duly proved, and therein, after reciting his former estate tail, and the common recovery suffered and executed, devised the tenements aforesaid to the inhabitants of *Northampton*, who are the defendants in error, in fee simple, and afterwards died so seised as aforesaid; — that on the death of the said *Joseph*, the defendants in error entered into the tenements aforesaid, and were seised as the law requires, on whom *Moses Hawley*, the original demandant, entered, and thereupon the defendants reëntered on him, and he thereupon sued his writ of entry.

[* 37] The verdict further finds, that if the said *Moses* had right to recover any part of the tenements, as a devisee * under the will of the said *Ebenezer*, then the defendants disseised him of one undivided ninth part; but if the said *Moses* had right to recover any part, as an heir at law of the said *Ebenezer*, then the defendants disseised him of one undivided eighth part; otherwise that the defendants did not disseise him.

The plaintiffs' claim is under an executory devise, to take effect on the dying of *Elisha* and *Joseph*, without issue living at their decease, they having estates in fee simple limited on this contingency, which in fact has happened. Or they claim in right of their father, *Moses*, who was a co-heir of *Ebenezer*, the original testator.

The defendants claim under the will of *Joseph*, on the ground that the plaintiffs' right was a remainder expectant on the determination of an estate tail in *Joseph*, which he barred by the common recovery. The decision of these respective claims must depend upon the construction of *Ebenezer Hawley's* will.

In construing a will, the testator's manifest intention, to be col-

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lected from the whole will, and not from any detached passages, must prevail, so far as such intention is consistent with the rules of law; and when the particular intent cannot be executed, the general intent must direct the construction. As it is the interest of the commonwealth that lands should be transferable,, and not remain in any man or family unalienable, so it is one of the rules of law, which limit the power of devising, that perpetuities be not created. Therefore, in a devise in fee simple, on condition that the devisee do not aliene, the condition is void. Also in a devise of lands in tail, on condition that the devisee do not bar the entail, the condition is void. And in a devise to one and his heirs, remainder to another and his heirs, which is termed the limiting of a fee simple after a fee simple, the remainder is void, because it would defeat the right of alienation in the first devisee.

But the law will allow a devise of lands in fee simple to one, with an *executory devise* over to another on a contingency,
* which must happen within the compass of a life or lives [* 38]
in being, and twenty-one years and a few months after.
The twenty-one years are introduced to provide for the minority of a child born, and a few months are allowed to let in a posthumous child. But if the devise over is limited after the devise of a part, and not of the whole of the fee simple, the second devisee shall take by remainder, either vested or contingent, and not by executory devise.

As remainders are estates at common law, while executory devises can only be created by will, and are admitted from necessity, to execute the legal intent of the testator, it is an essential principle of law, in the construction of wills, to exclude executory devises, when the estate can pass as a remainder.

It is another important rule, in the construction of wills, to give to specific words of the testator that technical effect which has been derived from usage, and sanctioned by a series of decisions. Thus, in a devise to one and his heirs, we cannot consider the heirs as deriving any interest from the devise, although the testator might have contemplated such interest; but we are bound to consider the word *heirs* merely as limiting a fee simple in the devisee. In a devise to a man, and to the heirs of his body, these last words are a limitation of an estate tail; and if it descend from the devisee in tail, all the heirs of his body cannot take together, but only in succession — the eldest son and his issue, then the second son and his issue, and so on. But if lands are devised to one without any limitation, he has only an estate for life; although, undoubtedly, the testator, when he devises a farm or a house to one, supposes that he has given a fee simple.

And there are cases where the same words shall have different constructions, according to the nature of the property to which they

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are applied, for the purpose of supporting the manifest general intent of the testator, when the particular intent is against law.

When lands and a chattel interest are devised to one, and
[* 39] if he die without *leaving issue*, * then a devise over, the devisee has an estate tail in the land, the words *leaving no issue* being, as to the land, understood as an indefinite failure of issue; but as to the chattel interest, they are construed as leaving no issue at the death of the devisee. Now, the testator had the same particular intention in devising the land and the chattel interest · but to support his general intention, the same words have a different technical construction. (70) In the devise of the land, the words *dying without issue* being understood as an indefinite failure of issue, gave the devisee an estate tail, provided for his issue, and the second devisee could take a remainder, so that it became unnecessary to introduce an executory devise; but as to the chattel interest, if an indefinite failure of issue was admitted, the first devisee would have the absolute property of the chattel, and the testator's general intention in favor of the second devisee would be defeated. And with respect to the land, if dying without leaving issue is to be intended as without having issue at his death, the first devisee would have an absolute estate in fee simple on having issue; yet he might aliene it from his issue, and the second devisee would have no benefit from the devise.

This technical effect to be given to specific words is required only in similar cases; for in a case where other words of the testator, or some particular circumstances, serve to give a different explanation to such specific words, a different construction ought to be admitted, so far as may be consistent with the rules of law.

The importance of adhering to a course of decisions, in the construction of wills, is manifest; for their authority has established a rule of property on which many estates depend, and to overturn them would introduce perplexing uncertainty, and might shake many titles resting on the faith of them. To this reason another may be added — that the rules of property should be so certain that, generally, men may know their titles without having recourse to expensive lawsuits. And when gentlemen learned in the
[* 40] * law are consulted, they should have some guides to direct them in their advice.

To decide without subjection to fixed principles may be called discretion, but, in fact, it is power. The common law consists of maxims and principles resulting from the practical wisdom of ages, and we know of no other discretion it gives to a judge, in deciding

(70) 1 *P. Will.* 667, *Forth* vs. *Chapman.* — 3 *Atk.* 288, *Sheffield* vs. *Lord Orrery.* · 2 *Vez.* 606, *Southby* vs. *Stonehouse.* — *Coop.* 410, *Geering* vs. *Hinton.*

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a novel question of property, than to apply those maxims and principles, by a sound analogy, to the new case. It is for the legislature to introduce new rules of decision.

With these general rules before us, we look into the will; and, as *Joseph* survived his brother *Elisha*, we will notice particularly the devise to *Elisha*, comparing it with the other parts of the will.

The devise to *Elisha* is to him, his heirs and assigns. This is an express devise of a fee simple to him; and, as the devise to *Joseph* is in the same terms, the plaintiffs can have no claim under the will of *Ebenezer*, if these devises were absolute. But he makes them upon the conditions, limitations, and contingencies after mentioned. These expressions it would be unreasonably rigid to construe technically; for a condition may, when necessary, operate as a limitation, a limitation may be on condition, and both may be contingent. This condition, limitation, or contingency is thus expressed: — *In case* Elisha *should die leaving no heirs of his body, living the said* Joseph, *or any heirs of his body lawfully begotten*, all the lands *devised to* Elisha *shall be and remain to* Joseph *or such his said heirs.* A similar provision as to the lands devised to *Joseph*, in favor of *Elisha* or the heirs of his body. — *But if* Joseph *and* Elisha *should die leaving no heirs of either of their bodies, then all the estate shall remain to his cousins who shall then survive.*

The effect of these provisions, as the plaintiffs contend, is, that estates in fee simple were devised to the two nephews *Elisha* and *Joseph*, and, at the decease of both, without leaving any issue at their deaths, the estates passed by executory devises to the cousins then living.

* But the defendants have argued, that by these devises [*41] the two nephews were tenants in tail, with cross remainders in tail, and a contingent remainder to the cousins then living.

No decision of a similar devise has been found, and we must give such a construction as will best effect the general intention of the testator without violating any established rules. We consider the words *dying without leaving heirs of his body* as equivalent to *dying without leaving issue.* Now, it seems to be settled that a devise to one and his heirs, and if he die without issue, or without leaving issue, then to another, creates an estate tail in the first devisee, with a remainder over, when the limitation over can take effect as a remainder, unless there are other words to control this construction. (71)

This rule is founded on the reasonable consideration that the testator included the issue of the first devisee as objects of his

(71) *Com. Rep.* 373, *Walter* vs. *Drew.* — *Hardw.* 258, *Wealthy* vs. *Bosville.* — *Doug.* 729, *Winkles* vs. *Billington.* — 2 *Saund.* 380, *Purefoy* vs. *Rogers.*

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bounty; and this bounty cannot be well effected but by vesting an estate tail in the first devisee; in which case, the issue on his death will take in succession, and when the issue shall fail, the remainder will take effect in possession. But if by such devise the first devisee shall take a fee simple conditional, although on his death not then having issue, the second devisee might take by executory devise; yet if the first devisee left issue, not only the claim of the second devisee would be defeated, but the issue could derive no benefit from the testator's bounty, as their ancestor might alienate the estate at his pleasure.

We have observed that this construction is sometimes controlled by other parts of the will. On this head two cases have been decided. The case of *Porter* vs. *Bradley*, cited at the bar, was an express devise in fee simple to one, and if he died without leaving issue *behind him*, then to another; and it was holden that the words "behind him" confined the dying without issue to the death of the first devisee, and consequently that the first devise was a [* 42] contingent * fee simple, and the devise over executory. — The other is the case of *Sheers & Al.* vs. *Jeffery*, also cited at the bar, where, after an express devise of a fee simple to one, and on his dying without issue, to another for life, it was holden that the testator intended the dying of the first devisee without issue at his death; because it could not be supposed that the testator would give a life estate to a person in *esse*, after the indefinite failure of the issue of the first devisee. This case is the stronger, because the life estate was not given by express words, but resulted from construction, as there was no limitation of the estate given to the second devisee. Whether the presumption was necessary may well be questioned, as the age or infirmity of the first devisee might not give the testator any expectation that he would ever have issue.

Agreeably to this case, if the devise before us was to the nephews in fee simple, and if they died without leaving issue, then to the cousins for life, the first devise would have been a contingent fee, and the second executory. But if the devise to the cousins was of a life estate, it would not avail the claim of the plaintiffs under the will in this action, because their ancestor counted upon a seisin in fee simple, which this construction would not support.

But admitting that a fee simple was devised to the cousins, yet we are satisfied that, on a principle analogous to this last case, the original devise to the nephews of an express fee simple would have been reduced to a conditional fee, if the devise over had been if they died without leaving issue, and no provision had been made for the issue of the nephews. For the devise over is to such of his cousins as should then be living. And the presumption that the

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testator did not intend a life estate to a person *in esse*, after the indefinite failure of the issue of the first devisee, is not stronger than a presumption, that he did not *intend a contingent estate to such of his cousins as should be living after the indefinite failure of the issue of both his nephews. [*43]

And if the testator had not considered the issue of his nephews as an object of his bounty, but leaving them to the discretion of their fathers, had confined it to his nephews and to his cousins, we apprehend the whole intention of the testator might well and legally be executed by a contingent fee simple to the nephews, and a devise over to the cousins living at the death of both the nephews, without having at their decease issues of their bodies. But if the issue of the nephews are provided for, then a different construction must prevail. (72)

But were not the issue of his nephews intended by the testator to have some benefit from his devise to their parents? Now, he has provided that on *Elisha's* death without leaving issue, living *Joseph* or his issue, *Joseph* or his issue shall take the lands devised to *Elisha*; and a similar provision for *Elisha's* issue in the lands devised to *Joseph* on his death without leaving issue, living *Elisha* or his issue. The testator has therefore expressly provided for the issue of his nephews in the lands respectively devised to their uncles. But as he clearly intended that the issue of each nephew should have the lands devised to his uncle on his dying without leaving issue, it must be inferred that he intended such issue should have the lands devised to his father leaving issue at his death; or we must absurdly suppose that the testator has protected the issue of each nephew against the alienation of their uncle, and at the same time left them to be disinherited by their father.

The conclusion from this reasoning is, that the testator intended to prefer the issue of the nephews to his cousins, and that the estate given to each nephew respectively should go to his issue, if he left any. This being his clear general intention, the will must receive a construction which will execute it. But the rights of the issue cannot be secured, *without vesting an estate [*44] tail in their fathers. For we know of no rule of construction, by which a devise to one in fee, on the contingency of his leaving heirs of his body, can be holden to be a contingent fee to the first devisee, and an executory devise to his issue. The devise of a contingent fee simple in the first devisee, and then over to the heirs of his body, being by the same instrument, must, by analogy to the ancient rule in *Skelly's* case, be considered as vesting an

(72) 9 *East*, 382, *Ellis* vs. *Ellis*

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estate tail in the first devisee; and the issue cannot take as purchasers.

Upon the plaintiffs' construction, the will is to be considered as devising first an estate in fee simple in the first devisee, then, on his death, to the heirs of his body, if he have any, — if not, then over to the cousins, which construction, it is said, is authorized by the case of *Fonnereau* vs. *Fonnereau*.

But this construction is not supported by that case. There the eldest son having a life estate, and his father, the testator, being seised only of a reversion, devised the estate to the heirs male of the first son, remainder to the other sons in tail in succession. — And it was holden, that as the first son took nothing by the will, his heirs male would take by executory devise, for *nemo est hæres viventis*, and consequently the devise to the second son was executory; that on the death of the first son leaving heirs male, they would take the estate in succession, and the devise over to the second son would then have been a remainder. And as the first son left no issue male, the second should take by executory devise. — This case may be simplified by supposing the devise to be of a reversion to be to the heirs male of *J. S.*, then living, remainder in tail to *A.* Now, as *J. S.* was living, as well the devise to his heirs male as that to *A.* are both executory; and if the heir male of *J. S.* ever take the estate in possession, then the interest of *A.* is a remainder.

But in the case at bar, it must be considered as a devise
[* 45] to *J. S.* and to his heirs, with remainder to the heirs * of his body; in which case very clearly *J. S.* would take an estate tail, and the heirs of his body, if he left any, would take by descent, and *A.* would take a remainder.

The only construction therefore, which will execute the manifest general intent of the testator, so as to include all the objects of his bounty, is by a devise to his nephews in tail, with cross-remainders in tail, and a contingent remainder to his cousins living when these estates tail should be spent. Upon this construction the nephews first take, then their issue in succession, then the survivor and his issue, and lastly the cousins.

But it is incident to an estate tail, to be barred by suffering and executing a common recovery, by which the rights of the issue, and of all in remainder or reversion, are extinguished. This is also the effect of the common recovery with single voucher, suffered by tenant in tail actually seised of the estate entailed.

We are therefore satisfied that *Joseph Hawley*, when he suffered the recovery, was seised of an estate tail, which was barred by the execution of the recovery, and a use in fee simple raised to him-

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self; and that the estate lawfully passed by his will to the defendants to hold in fee simple.

Neither *Moses Hawley*, the original demandant, nor the plaintiffs in error, his heirs, have now any claim to the tenements demanded, under the will of *Ebenezer Hawley*. And there does not seem to have been any color of title in *Moses Hawley*, as an heir at law of *Ebenezer*, the testator, who certainly by his will devised all his interest in the lands, leaving no reversion in himself, unless the two nephews took estates in tail. And if they did, and the entails are legally barred, then that reversion is extinguished. And as we are of opinion, that the two nephews took cross-remainders in tail, *Joseph*, the survivor in possession, lawfully barred the reversion. The defendants in error must therefore have judgment. (*a*)

(*a*) [According to the laws of descent, in force when the will was made, the words 'heirs of his body lawfully begotten" included all the legitimate children of the testator. For all the children, male and female, were equally heirs of the body. *Rob. Geo.* 119, 120. — *Dyer*, 179, *b.* — *Roe* vs. *Aistrop*, 2 *Bl.* 1228. — *Co. Lit.* 10, *a*, n. 3, 4. — ED.]

[*46]

*JUDAH BLISS & AL. *versus* JOEL NEGUS.

A promissory note given in consideration of the assignment of a patent right, which had been fraudulently obtained, was held void, although certain materials had been furnished, and certain instructions given by the promisee to the promisor in the art described in the patent.

CASE upon a promissory note made by the defendant, payable to the plaintiffs.

Upon trial of the action at the last April term in this county, before *Sedgwick*, J., a verdict was taken for the defendant, subject to the opinion of the court upon the judge's report.

From that report it appeared that the note declared on, and another of the same amount, were given in consideration of a deed of assignment dated March 31st, 1806, a copy of which came up in the case. After reciting that one *John Sibley*, on the 13th of December, 1803, obtained letters patent from the government of the United States, securing to him, his heirs, &c., for the term of fourteen years, the exclusive right and liberty of making, using, and vending to others, to be used, a new and useful improvement in painting rooms, ornamenting ceilings, borders, &c., and thence deriving the said patent right, through several mesne conveyances to the plaintiffs, the deed assigns to the defendant, for the consideration

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of one hundred and fifty dollars, *all the right and privilege* so conveyed to the plaintiffs, to be exercised within certain enumerated towns in the county of *Worcester*, with a covenant to warrant and defend *the same* against the claims of any other person.

It was agreed at the trial, that the letters patent, mentioned in the assignment, were duly issued in conformity to the statute; but it appeared in evidence that the invention mentioned in the letters patent was not the invention of the patentee, and that the art of that invention had been long before the patent publicly known and used, both in *England* and in the *United States*; and that this was known to the patentee at the time he obtained the letters patent. It also appeared, and was admitted to be true, that at the time of making the deed above mentioned, none of the assignments mentioned therein had been recorded in the office of the secretary of state.

[*47] *On this evidence the judge ruled that a verdict ought to be found for the defendant; and a verdict was found accordingly. — But the judge observes, that what gave rise to his report were the following facts: —

It appeared by the evidence that the notes and the assignments were made and executed in the forenoon of the 31st of March, 1806. Afterwards, on the same day, and while the parties continued together, there were delivered to the defendant by the order of the plaintiffs, certain samples in relation to the invention mentioned, and some paint proper to be used in the art; and at the same time one of the plaintiffs undertook to send to the defendant two persons to instruct him in the art. In pursuance whereof a man and boy were sent and labored in the art, in presence of the defendant, a part of two days.

Hereupon the plaintiffs' counsel insisted, that from this evidence the jury ought to presume, that the articles so delivered, and the labor so performed, made part of the consideration of the note; and if so, that that circumstance would give validity to the note.

Upon this point the judge instructed the jury to inquire whether those articles and labor formed any part of the consideration for which the note was given; and if they were of that opinion, to find by their verdict the value of the articles and labor, which they accordingly found to be fourteen dollars.

The action stood over to this term, upon the motion of the plaintiffs for a new trial for the misdirection of the judge And now,

Bliss, of counsel for the plaintiffs, contended that the deed of assignment in the case contained in itself a sufficient consideration to support the action upon the notes. Admitting the patent to be

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void, yet the deed contains sufficient covenants to form a consideration, and upon which the defendant may have his remedy, if he is entitled to any. A mere recital in a deed creates a covenant. (1) In this deed there is a recital that the patentee obtained the right, and that by *sundry assignments that right has [*48] accrued to the plaintiffs. Now, if either of these recitals are not true, an action of covenant will lie. They form, then, a valuable consideration for the note, and the plaintiffs were entitled to a verdict for the whole sum secured by it.

But if the deed itself does not furnish a sufficient consideration, yet the case finds that materials and labor were furnished by the plaintiffs, as a part of the same transaction, and these of themselves formed a valuable consideration sufficient to support the promise. They were a loss to the plaintiffs, and whether this was greater or less, the plaintiffs were entitled to recover the amount of the note — If this position should be overruled, it seems very clear that the plaintiffs are entitled to recover on this note the price of the labor and the materials furnished by them; and if they were entitled to no more, the verdict ought to be set aside and a new trial granted. (2)

Allen, for the defendant, insisted, that as nothing passed to him by the assignment, there was no consideration for the note. The covenants are all attached to the thing pretended to be granted, which being in fact nothing, the covenants are perfectly null. The plaintiffs must have known that the mesne assignments were never recorded. The case of *Hayne & Al.* vs. *Maltby* (3) is exceedingly like the present. Where, as in this case, nothing at all is conveyed, the rule of *caveat emptor* does not apply. (4)

As to the notion that the paints and labor were a sufficient consideration, it is a principle of law well established, that where a part of the consideration of a contract is false, the whole contract is void. (5) Besides which, the case finds that the paints were delivered and the labor performed after the notes were given.

SEDGWICK, J., delivered the opinion of the Court to the following effect: —

The demand of the plaintiffs is resisted on the ground, that there was no valid and sufficient consideration for the promise expressed in the note, on which the action was brought.

(1) 1 *Esp. Dig.* 268. — 1 *Leon.* 122, *Severn* vs. *Clark.*
(2) 1 *Bos. & Pul.* 101, *Marchington* vs. *Vernon & Al. note* (c.) — 3 *Bos. & Pul.* 149, *note* (a.)
(3) 3 *D. & E.* 438.
(4) 3 *Bos. & Pul.* 162, *Johnson* vs. *Johnson.* — *Doug.* 655, *Bree* vs. *Holbech.*
(5) *Cro. Eliz.* 848, *Coulston* vs. *Carr.* — *Hob.* 5, 126.

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[*49] *On the 13th of December, 1803, one *John Sibley* obtained from the government of the United States a patent for the term of fourteen years, for the exclusive right of making and vending what is therein called a new and useful improvement in painting rooms, ornamenting ceilings, &c.

After several mesne assignments, one was made to *Judah Bliss* and *John Rice*, the present plaintiffs, of the right of using and vending within certain specified limits, the art described in the letters patent; and on the day on which the note was made, *Bliss* and *Rice* assigned to the defendant the right of using and vending, within the limits assigned them, the same art. At the time of the last assignment, none of those previous thereto had been recorded in the office of the secretary of state, as required by the act of congress. In consideration of this assignment, this note and another of the same amount were made.

The art, for which the letters patent were obtained, was not the invention of *Sibley*, the patentee, but, on the contrary, had, long before the issuing of the patent, been publicly known and practised, as well in this country as in *England;* and this was known to the patentee at the time the letters patent issued. The letters patent were then obtained by fraud and false swearing, and were utterly void. The consequence is, that the patentee obtained nothing by his patent; and of course nothing was conveyed by the subsequent assignments. The assignor lost nothing, nor did the assignee acquire any thing. And besides, *Bliss* and *Rice*, at the time of their assignment to the defendant, knew that they had not acquired a complete and valid title; for they had not procured their assignment to be recorded.

As, then, the assignment to the defendant was merely void, and conveyed nothing, there can be no pretence that it is a sufficient consideration to render valid in law the note which was given.

Nor did the counsel for the plaintiffs insist that the assign-
[*50] ment was in itself a sufficient consideration: *but he argued that the deed of assignment to the defendant contained covenants, on which an action can be supported; and that a cause of action is a sufficient consideration to maintain an action on the note.

It is evident that, if the principle relied upon could apply in this case, the only consequence would be, to authorize the plaintiffs to recover, as a ground for the defendant to recover against them in an action of covenant on the deed; and the reasoning must be very strong and apparent, which would authorize such a judgment.

But we are all satisfied that the words will not admit of such a construction. The words principally relied upon are that "whereas

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Sibley did obtain from the government of the United States of America letters patent, securing to the said *Sibley* the exclusive right and liberty of making, using," &c. — These words are used only by way of preamble, and do not assume any express obligation or undertaking; nor indeed do they contain any direct affirmation. — The other words of *recital*, which are expressed in the deed, and which can by possibility be considered as expressing covenants, are those which state the several assignments which have been made; and whether such assignments have or have not been made is wholly unimportant, because they would undoubtedly be wholly ineffectual.

But there is one express covenant. *Rice* and *Bliss* covenant with the defendant, that they would warrant and defend to him, his heirs and assigns, what was the subject of the assignment, against the claims of any other person. The subject of this assignment was "all the right and privilege" conveyed to them, as derived from the letters patent granted to *Sibley*. Now, it has been already shown, that there was nothing conveyed to *Sibley* by the letters patent; and consequently there was nothing, which could be beneficial to the defendant, for this covenant to operate upon.

As to the principal question in this case, the case of *Hayne & Al.* vs. *Maltby*, cited at the bar, goes much [*51] further than is necessary to determine this. There *A*, asserting that he had a right to a patent machine, covenanted with *B*, that he might use it in a particular manner, in consideration whereof *B* covenanted that he would not use it in any other. In an action brought by *A* upon that covenant, it was determined that *B* was not estopped by his covenant from pleading in bar to that action, that the invention was not new, or that *A* was not the inventor; *but that he might show that the patent was void.*

But there is another ground, on which the plaintiffs' counsel rested his right to recover, either the whole amount of the note, or at least so much as was the value of the samples, paints, and labor, which were furnished by the plaintiffs to the defendant.

It is true, that if a promise be made on two considerations, and one of them be invalid or void, and the other be good and lawful, the promise is binding. It is also true, that if a promise be made on two considerations, and the one be fraudulent, unlawful, or immoral, and the other good, the promise is void. It does not appear to me that this belongs to either class of these cases. It does not appear that the samples, paints, and labor, furnished by the plaintiffs, were in any degree valuable or useful to the defendant, but as subservient to the art, which was pretended to be conveyed by the assignment The whole was one compound, connected subject, the

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adjuncts of which were tainted by the principal substance. We are therefore all of opinion, that the defendant is, upon the whole matter, entitled to judgment. (*a*)

(*a*) [It has been held that where any benefit has been received from the assignment of letters patent, or a license to use the thing patented, the price paid for it cannot be recovered back, on the patent being declared void. *Taylor* vs. *Hare*, 4 *B. & P.* 260. — *Mortimer* vs. *Fleming*, 6 *D. & R.* 186. — *Davies*, 307. — *Williams* vs. *Hicks*, 2 *Vermont Rep.* 36. — ED.]

ELIEL GILBERT *versus* JOHN C. WILLIAMS, ESQ.

Whenever an attorney disobeys the lawful instructions of his client, and a loss ensues, the attorney is responsible for such loss.

THE declaration alleges that the defendant is a practising attorney in the counties of *Berkshire* and *Hampshire*; that the plaintiff, being possessed of a certain promissory note for 28 dollars made by one *Willard* and payable to one *Cutler*, delivered the same note to the defendant, to be by him collected and paid over to
[*52] the plaintiff, the same being *due and the property of the plaintiff; that he retained and employed the defendant, for a reasonable fee or reward to be paid him by the plaintiff, in his said capacity of attorney, to use all necessary care and fidelity in suing and collecting said note, and especially directing him without delay to commence a suit thereon, and to attach sufficient property of *Willard's* to secure the debt and costs, which he might have done; but that he so carelessly and negligently conducted the said trust, that the note has never been paid or collected, and the plaintiff has wholly lost the money due on said note, by the mere negligence of the defendant in his said capacity as aforesaid.

The action was referred to the opinion of the Court upon an agreed statement of facts, in substance as follows: —

In February or March, 1804, the plaintiff wrote a letter to the defendant, then collecting attorney in the courts of the counties of *Hampshire* and *Berkshire*, containing a copy of the note mentioned in the declaration, requesting the defendant to collect the money due on it, suggesting that he considered the debt precarious, and desiring him to secure it by an immediate attachment of the debtor's property. On the 15th of March, the defendant answered the plaintiff's letter, saying that he had seen *Willard*, that he was to continue there in business, and had assured him that if the note was

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sent, it should be paid. March 20th, the plaintiff replied, "Agreeable to your request I enclose the note against *Willard*. Should you get the money, it will not be necessary to send it by mail. Probably you will attend the first court at *Northampton*, and if I am not there, you may hand it to Mr. *Leavitt* or Mr. *Newcomb*."

At that time *Willard* was tenant of a furnace in *Dalton* at a rent, carrying on business therein, and apparently in large and profitable business and good credit. When called on by the defendant to pay the note, he assured him that he would pay it shortly, and proposed to get an order on the defendant from one *Booth*, for whom the defendant was collecting money, and with whom *Willard* had dealings. *The note not being paid, the [*53] defendant on the 7th of May filled a writ against *Willard*, which he endorsed, and on which he directed sufficient property to be attached, or no service to be made of it. But on *Willard's* assurance that the money should be paid before the court should sit, or an order obtained from *Booth*, the writ was not delivered to an officer. *Willard* continued in good credit until June 15, 1804. He had before that time confessed a judgment to one *Goodwin* for about 700 dollars, which was not known to the defendant. A few days previous to the 15th of June, *Goodwin's* execution on the said judgment was delivered to a deputy sheriff, who arrested *Willard* thereon, pursuant to orders from *Goodwin*, and committed him to prison. But it is agreed that, had the officer had other orders, he might have secured the demand. On this his other creditors immediately attached his property, which was sold at a very great loss upon execution. The defendant was absent from home on the day of *Willard's* arrest, but returning in the evening, he delivered a writ of attachment against *Willard* to a proper officer, directing him to attach property. On this writ the officer's fees for attaching and securing property, all of which had been previously attached, were charged at 8 dollars 25 cents, and paid by the defendant. The property so attached was afterwards sold to satisfy judgments secured by prior attachments. A judgment was obtained against *Willard*, and execution sued out and delivered to an officer for collection; but no part of it was collected, and *Willard* is insolvent, and wholly unable to satisfy the judgment.

On the above-mentioned 15th of June, while the defendant was from home, two writs of attachment were issued by his clerk, (who did not know that *Willard's* note had been left with the defendant for collection,) by which *Willard's* property was secured, to the value of more than 50 dollars.

It is agreed that the defendant received no other instruc-

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[* 54] tions from the plaintiff, than are above mentioned; * that the plaintiff knew nothing of the proposed arrangement for payment by way of *Booth*, as above stated; and that *Willard's* note to *Cutler* was the property of the plaintiff.

Upon these facts it was agreed that the Court should render judgment, provided that in their opinion the same would support the plaintiff's declaration, or any other that could be filed in the case arising on the said facts. If the Court should be of opinion that the defendant was guilty, judgment to be rendered for the plaintiff for 30 dollars 24 cents, with interest from the recovery of the judgment against *Willard*; otherwise the defendant to recover his costs.

The cause was argued at the last September term in this county by *Leavitt* and *Newcomb* for the plaintiff. Mr. *Williams* defended himself.

For the plaintiff, it was argued, than an attorney is bound to follow the legal directions of his client, and is of course answerable to him for all the damages arising to his client from his neglect or mismanagement, although chargeable only to an error in judgment. (1) He is obliged to use all due diligence, and take effectual measures for the security of demands committed to him for collection, if the same be possible. He is not at liberty to use the same degree of lenity and indulgence that he might think to be proper in his own affairs. — If these principles are sound, there can be no doubt that Mr. *Williams* has made himself chargeable to the plaintiff in this case, although habitually a very correct and attentive attorney.

Williams. The defendant does not consider himself holden, either in equity or honor, to make good the loss of the plaintiff by *Willard's* failure; and he has been advised by some of his brethren at the bar, that he is not holden to do it by the law of the land. From a desire to give the plaintiff the fairest opportunity for the investigation of his right, and to cause the least possible trouble to the Court, the defendant has been induced to accede to the agreement on which the action is submitted to the Court.

[* 55] * The defendant was never retained and employed by the plaintiff, on a reward to be made for service; nor did he ever undertake to make an attachment, as the plaintiff alleges. On receiving the plaintiff's first letter, not thinking it his duty to make an attachment, for so trifling a demand, upon a man in business and credit, who might be greatly injured by such a measure, he informed the plaintiff that he had seen his debtor, that he was

(1) 2 *Wils.* 325, *Russel* vs. *Palmer*

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in *Dalton*, and was to continue in business there, and had assured the defendant that when the note was produced he would discharge it. The plaintiff thus knew that the defendant had not pursued his instructions to make an attachment; yet in his second letter he uses no complaint, but impliedly consents that the defendant should pursue the course he had begun.

The note of *Willard* was not negotiable. An action upon it must therefore have been brought in the name of the promisee, who lived in the state of *Vermont*. If an attorney, on receiving a note and directions to make a special attachment upon it, is obliged by law to issue a writ, and to endorse it himself, or to procure an endorser, the plaintiff has a right to recover in this action. But it is believed that, had the plaintiff applied in person for a writ, had he even tendered the fee, and offered to endorse the writ, still the defendant was at liberty to undertake for him or not, at his election. But certainly he was not obliged to endorse a writ for an inhabitant of *Vermont*, from whom he might never obtain an indemnity.

But the defendant believes that he had a right to judge of the necessity or propriety of issuing a special attachment, on so small a demand, against a person of credit, engaged in the large and complicated concerns of a furnace. The plaintiff must have had the same conviction, or in his second letter he would have expressed some dissatisfaction, would have censured the defendant's conduct, would have renewed his former severe and inhuman directions, and would have sent the note to some agent more suited to his * views. But instead of all this, he sent the note to [*56] the defendant, under a full knowledge of what he had done, and of what he intended to do.

Had the furnace which *Willard* occupied, and the store containing his goods, been consumed by fire, while the defendant delayed to make the attachment, the law would not have held him accountable for not having caused the goods to be removed out of danger from such an unforeseen misfortune. The defendant could as ill foresee that the violence of rivalship had contrived a plan to stop the *Dalton* furnace, to blast *Willard's* credit, and sink him in remediless ruin. Perhaps nothing short of fire or earthquake could so effectu ally have destroyed him, and the business he was engaged in, as the arresting his body on *Goodwin's* execution for 700 dollars, and thus compelling instant payment or forcing him to jail. It may safely be affirmed that there has been no instance of so great a sacrifice of property, where an equal capital was employed, as in this instance. — The very expense of removing the stock would have paid many such demands as the plaintiff's.

There is very little in our books bearing on such a case as this.

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To the parties the decision is of small consequence. But as furnishing more certain rules of conduct to attorneys than they have heretofore had, it may perhaps be of more consequence to the public than to the parties. The decision will be according to the law of the land, and may be a precedent to future times. The defendant, however, is willing that the plaintiff should have the benefit, not only of rigid rules of law, but of the most liberal equity, if by either he can entitle himself to judgment. The defendant begs leave to apologize to the Court for the time he has occupied in his defence, to which he has been prompted, less by a regard for his personal interest, than by the advice of persons whose opinion he respects.

For the plaintiff, in reply, it was observed, that as attorney to the plaintiff, the defendant had a right to endorse the plain
[*57] tiff's name on the writ, if he was sufficient. If he *was not, the attorney was bound to notify his client, that he did not choose to become answerable himself, and that he must furnish an endorser.

The cause was continued for advisement, and at this term the opinion of the Court was delivered as follows, by

SEDGWICK, J. There is no doubt that for any misfeasance or unreasonable neglect of an attorney, whereby his client suffers a loss, an action may be supported and damages recovered to the amount of that loss. By this I do not mean that an attorney is to be answerable for every error or mistake, and to be punished for it, by being charged with the payment of the debt, which he was employed to recover for his clients; but, on the contrary, that he shall be protected, where he acts with good faith, and to the best of his skill and knowledge. (2)

It would be unnecessary in this case, were it practicable, to define precisely the kind of neglect, for which an attorney is responsible to his client. It will be sufficient to decide this case, *that whenever an attorney disobeys the lawful instructions of his client, and a loss ensues, for that loss the attorney is responsible.* Let the claim of the plaintiff in the action before us be tried by this rule.

In February, or March, 1804, the plaintiff enclosed a copy of a note against *Charles Willard* to the defendant, informing him that he wished to have the contents collected; that he considered the debt as precarious; and requesting to have it secured immediately by attaching *Willard's* property. — The instructions were, to have the debt immediately secured by attaching the property. Such instructions he had a right to give; and it was the duty of the defendant, if he undertook the trust of collecting the debt for the plaintiff, to

(2) 4 *Burr.* 2061, *Pitt vs. Yalden.*

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obey them. — He did undertake it; and on the 15th of the same March informed the plaintiff by letter, that he had seen *Willard*, who, he said, was to continue in business, and that he had assured him, if the note was sent to him, (the defendant,) he (*Willard*) would pay it. On the 20th of March, the note was *enclosed and sent by the plaintiff to the defendant, [*58] without any new instructions, further than as to the manner of remitting the money.

From this statement of the facts, it is manifest that the instructions of the plaintiff were disobeyed. But it is said, by the terms of the letter of the 20th of March, they were waived. — Of this, in my opinion, there is no pretence. It is true no new instructions were given, nor were they necessary. All the information which the plaintiff had received, after he had made up his mind that his debt was precarious, and had given instructions conformably to have it secured, was derived from the defendant. If the debt was paid, he certainly did not wish that a suit should be instituted; but there was nothing in his letter which indicated a consent to delay on any other terms.

After some proposals by *Willard* to the defendant as to making payment had failed, he, on the 2d of May, issued a writ of attachment, with orders to secure the debt, which might then have been done. But the defendant, instead of obeying the instructions which he had so long before received, accepted a new promise, and the writ was not served. On the 15th of the ensuing June, two writs were issued from the defendant's office against *Willard*, and more property was attached than would have been sufficient to satisfy the plaintiff's demand. At this time the defendant was from home, and the writs were issued by his clerk. This surely can be no excuse for the defendant. After having, at his own pleasure, without the consent of the plaintiff, and against the obvious meaning of his instructions, suspended proceedings against *Willard*, he ought not to have left his office in the charge of his clerk, without giving orders to secure this debt, if it should become necessary.

It appears, then, that from some time previous to the 15th of March, when the defendant made his answer to the plaintiff's letter of instructions, the defendant neglected to obey them; and it also appears, that during the whole of *that time [*59] *Willard* had open and visible property, which might have been attached to secure the plaintiff's debt, and which would have been so attached, if his instructions had been obeyed. Surely these facts show that there has been an unreasonable neglect, and a consequent loss, for which the defendant is accountable.

After pronouncing this opinion, it is but justice to the character

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of Mr. *Williams*, to declare that I am acquainted with no man, in whose faithful and upright conduct, and diligent attention, as an attorney, I should place more confidence. And in the case before us, although the error on the part of Mr. *Williams* was such, as to render him liable to indemnify the plaintiff for the loss he has sustained, yet I have no doubt it had its foundation in a humane desire to save expense and vexation to the debtor.

It is the unanimous opinion of the Court, including the *Chief Justice*, who was present at the hearing of the cause, that the plaintiff is entitled to judgment.

MURRY BROWN, Plaintiff in Error, *versus* THE COMMONWEALTH.

To an indictment upon the second section of the statute of 1804, c. 120, for having in possession ten or more counterfeit bank bills, it is no sufficient objection, that it is alleged, that such bills purport to be bills of such a bank; that they were payable to the bearers thereof; that they are not alleged to be *similar* bills; that they are described as promissory notes *or* bank bills; or, that it is not alleged, that the party charged had knowledge of the false making, &c.

AT the last April term in this county, the following indictment was found against the plaintiff in error: —

"The jurors for the said commonwealth on their oath present that *Murry Brown*, of, &c., on, &c., at, &c., with force and arms, had in his custody and possession ten false, forged, and counterfeit bank bills or promissory notes, purporting to be ten bank bills or promissory notes payable to the bearers thereof, and to be signed in behalf of the president and directors of the *Union Bank*, for the sum of three dollars each; the said president and directors of the said *Union Bank* being then and still a corporation, by
[* **60**] law * licensed and authorized as a bank within this commonwealth; — and that the said *M. B.* then and there had in his custody and possession three other false, forged, and counterfeit bank bills, or promissory notes, purporting to be three bank bills or promissory notes payable to the bearers thereof, and to be signed in behalf of the president, directors, and company of the *Beverly Bank*, for the sum of three dollars each, the said president, directors, and company of the said *Beverly Bank* being then and still a corporation by law licensed and authorized as a bank within

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this commonwealth; — and that the said *M. B.* then and there had in his custody and possession three other false, forged, and counterfeit bank bills or promissory notes, purporting to be three bank bills or promissory notes payable to the bearers thereof, and to be signed in behalf of the president, directors, and company of the *Boston Bank*, for the sum of three dollars each, the said president, directors, and company of the said *Boston Bank* being then and still a corporation by law licensed and authorized as a bank within this commonwealth; — each and every one of which false, forged, and counterfeit bank bills or promissory notes before mentioned and described were then and there retained and kept by him, the said *M. B.*, in his hands and possession, so that the jurors aforesaid cannot set forth the tenor thereof; — and the jurors aforesaid, upon their oath aforesaid, do further present, that the said *M. B.*, *having knowledge* that each and every one of the aforesaid bank bills or promissory notes were false, forged, and counterfeit, did then and there willingly aid and assist in rendering them and each and every one of them current as true; and for that purpose did then and there have and possess, at one and the same time, all and every one of the aforesaid false, forged, and counterfeit bank bills or promissory notes, knowing the same to be false, forged, and counterfeit, as aforesaid, with intent to utter and pass the same, and thereby to injure and defraud the said president and directors of the said *Union Bank*, the president, directors, and company of * the [* 61] said *Beverly Bank*, and the president, directors, and company of the said *Boston Bank*; against the peace of the said commonwealth, and the form of the statute in such case made and provided."

"And the jurors aforesaid, upon their oath aforesaid, do further present that the said *M. B.*, on, &c., at, &c., with force and arms, had in his custody and possession twenty false, forged, and counterfeit bank bills or promissory notes, purporting to be twenty bank bills or promissory notes payable to the bearer, and to be signed in behalf of the president, directors, and company of the *Worcester Bank*, for the sum of five dollars each, the said president, directors, and company of the said *Worcester Bank* being then and still a corporation by law licensed and authorized as a bank within this commonwealth; which said twenty false, forged, and counterfeit bank bills or promissory notes were then and there retained and kept in the possession of the said *M. B.*, so that the jurors aforesaid cannot set forth the tenor thereof; and that he, the said *M. B.*, then and there having knowledge that the aforesaid twenty bank bills or promissory notes, and each and every one of them, were false, forged, and counterfeit, did then and thereby willingly aid and as-

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sist in rendering them and each of them current as true, and that, for that purpose, he, the said *M. B.*, did then and there, and at one and the same time, have and possess the aforesaid twenty false, forged, and counterfeit bank bills or promissory notes, and each and every one of them, knowing the same to be false, forged, and counterfeit, as aforesaid, with intent to utter and pass the same, and thereby to injure and defraud the president, directors, and company of the said *Worcester Bank*, against the peace of the said commonwealth, and the form of the statute in such case made and provided."

Brown, having been convicted on a trial had before *Sedgwick*, J., and being sentenced to confinement to hard labor in the state's prison for life pursuant to the statute, sued out his writ of error to procure a reversal of the said sentence, assigning the following errors, viz.

[* 62] * 1. That it is alleged in said indictment, that the said *M. B.*, on, &c., at, &c., had in his custody and possession ten false, forged, and counterfeit bank bills or promissory notes, purporting to be ten bank bills or promissory notes payable, &c.; whereas, in fact, the said bank bills do not purport to be ten bank bills.

2. That it is alleged in said indictment, that the said *M. B.* on, &c., at, &c., had in his custody and possession ten false, forged, and counterfeit bank bills or promissory notes, purporting to be bank bills or promissory notes payable to the bearers thereof, &c.; whereas, in fact, it ought to have been alleged in said indictment, that the said bank bills were payable to the bearer thereof.

3. That it is nowhere alleged in said indictment, that said ten bank bills were *similar* bills, as mentioned in the statute, upon which said indictment was founded.

4. That it is alleged in the said indictment, that the said *M. B.* had in his custody and possession false, forged, and counterfeit bank bills *or* promissory notes, without alleging whether they were in fact bank bills or promissory notes.

5. That the said indictment does not, with sufficient certainty, describe the titles or the names of the several banks, or the bank bills in said indictment mentioned.

6. That no offence or crime is charged in said indictment, upon which the said sentence of said court could be passed, and the said judgment awarded, by force or in virtue of the statute, upon which said indictment was founded.

7. That it is nowhere alleged in said indictment, that the said *M. B.* had knowledge of the false making, altering, or counterfeiting the bank bills or promissory notes mentioned in said indictment

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as the statute on which said indictment was founded requires. — All of which errors apply to all the descriptions, allegations, omissions, and deficiencies, in both counts in said indictment.

8. Generally, the said *M. B.* says that the said record, indictment, sentence, judgment, and proceedings are in all things erroneous.

*The cause was argued by *Bliss* and *Mills* for the [* 63] plaintiff in error, and by Mr. Solicitor-General [*Davis*] for the commonwealth; and after the argument, being continued *nisi* for advisement, at the following March term in *Suffolk*, the opinion of the Court was delivered, as follows, by

SEDGWICK, J. There are two counts in the indictment, charging the same offence; and if either of them be good, the conviction and judgment are right; and as all the objections are equally applicable to each, I shall confine my observations to the last, because it is the most simple.

This count charges the prisoner with possessing, with the unlawful intention which constitutes the offence, twenty false, forged, and counterfeit bank bills *or* promissory notes, purporting to be twenty bank bills or promissory notes payable to the *bearers* thereof, and to be signed *in behalf* of the president, directors, and company of the *Worcester Bank*, for the sum of five dollars each; averring, in the words of the statute, that they were a corporation by law licensed and authorized, as a bank within the commonwealth; and alleging that the bills were retained and kept in the prisoner's possession, so that the jurors could not set forth their tenor; and that he, having knowledge that the bills or notes were, and that each of them was, forged, did then and there aid and assist in rendering them and each of them current as true; and that the prisoner did then and there, at one and the same time, have and possess them, and each of them, *knowing them to be false, forged, and counterfeit*, with intent to utter and pass them, and thereby to defraud the president, directors, and company of the *Worcester Bank*.

The first objection to the indictment is the allegation, that the twenty bank bills or promissory notes *purported* to be *twenty* bank bills or promissory notes. It is said there is nothing in the bills like a purport of *twenty* bills; but that, on the contrary, the purport must be understood from the inspection of each bill separately, and that so the *purport is of each bill severally, [* 64] as one bill of five dollars.

I admit that the purport of an instrument is that which appears upon the face of it, as laid down in the case of *The King* vs. *Reading*; (1) but then I am satisfied, that to the understanding of every

(1) 2 *Leach's C. L.* 672. — 2 *East's C. L.* 981.

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one, whether learned or unlearned, a declaration, that twenty pieces of paper purporting to be *twenty* bank notes, would be considered as tantamount to affirming, that those twenty pieces of paper purported each one to be a bank note. — And a similar answer may be given to the second objection, which is, that the bills purported to be payable to the *bearers* thereof. This cannot but be understood as declaring that each of the twenty notes was payable to the bearer of it.

Another objection is, that the papers alleged to have been in the prisoner's possession are denominated bank bills *or* promissory notes, and that it is not said whether they were bank bills or promissory notes.

The subject of this crime, as described in the statute, (2) is, "any bank bill or promissory note, payable to the bearer, signed in behalf of any company or corporation, by law licensed and authorized as a bank within this commonwealth." — Now, the paper which was in the possession of the prisoner was payable to bearer, and signed in behalf of the bank; and a note issued, as these purported to have been, by a banking company, and payable to bearer, is a promissory note; and it is also a bank bill; and therefore the indictment brings the case, in this respect, expressly within the words of the statute.

Another objection is, that the indictment does not, with sufficient certainty, describe the titles or names of the banks and bank bills mentioned in the indictment.

This objection, whether well or ill founded, was not intended, as I understood, to apply to the last count of the indictment; and therefore it does not require a particular examination.

The two other objections, which are specifically stated, are, — 1. That the prisoner's "having knowledge of the false [* 65] * making of the bills," is not alleged in the words of the statute; and, 2. That the bills, which are alleged to have been in the possession of the prisoner, are not averred to be "similar."

I was deeply impressed by the force and ingenuity with which these objections were pressed by the prisoner's counsel; and have been since induced to give them a very serious and deliberate consideration.

I am perfectly satisfied of the justness of Lord *Hale's* observations as to the effects of the great "strictness," which are required in indictments for capital offences; (and the offence with which this prisoner is charged is almost of that nature;) that from thence many times gross murders, burglaries, and other heinous and crying

58 (2) 1804, *c.* 120

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offences, escape by those unseemly niceties, to the reproach of the law, to the shame of the government, and to the dishonor of God. (3) Yet, to all these niceties a prisoner is entitled, as none of the statutes of *jeofails* extend to indictments; and he will continue to be so entitled, until the legislature shall see fit to interfere.

The rule, on which the counsel for the prisoner rely, is laid down in *Hawkins* (4) in the following words, (speaking of indictments upon statutes:) "I take it for a general rule, that unless the statute be recited, neither the words *contra formam statuti*, nor any periphrasis, intendment, or conclusion will make good an indictment, which does not bring the fact prohibited or commanded, in the doing or not doing of which the offence consists, within all the *material* words of the statute." The same rule is laid down, with equal strictness, by *Hale*, (5) by *East*, (6) and other writers on criminal law; and it has been sanctioned by innumerable decisions in adjudged cases. The question is, whether this rule can be so applied in this case, that we ought to infer that the indictment is bad? — In other words, are the expressions relied upon *material* in the description of the offence charged upon the prisoner? 1. The *first* words relied upon are, "having knowledge of * such [* 66] false making" of the bills. — The indictment charges the prisoner with the possession of the bills, "having knowledge that they and each of them were false, forged, and counterfeit;" and that he aided and assisted in rendering them current as *true*, at the same time "knowing that they were false, forged, and counterfeit." But the indictment does not charge the prisoner, in the words of the statute, with "having knowledge of the false *making*" of the bills; by which was meant, it is said, that to constitute the offence charged against the defendant, it is necessary that he should have had knowledge of the false making, *at the time of the fabrication;* not that he should have acted in concert with the counterfeiters, for that would constitute the crime of counterfeiting; but that he was in their confidence and knew their secrets. Now, if it was the intention of the act, that, to constitute this offence, there should be such knowledge, the omission is fatal; but if the words "having knowledge of the false making" mean no more than that *he knew that the bills were falsely made*, then the objection cannot prevail; for such knowledge is expressly alleged in the indictment. It is then merely a question of the construction of the statute.

The crime intended, for which the severe chastisement of perpetual imprisonment is prescribed, is the intention, by combination

(3) 2 *H. H. P. C.* 193.
(4) 2 *Hawk P C. c.* 25, § 110
(5) *H. H. P. C.* 170.
(6) 2 *East P C* 985

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with counterfeiters, of aiding in uttering spurious paper money; and the overt acts necessary to be proved, to constitute that intention, are, 1. Possession of such paper; 2. A knowledge that it is false; and, 3. An intention of passing it as true.

I purposely omit, now, to consider as to the species of paper particularly designated by the word *similar;* because that must be distinctly considered hereafter. But, having in possession such paper as the statute intended, with an intention of passing it as true, with the knowledge, which the legislature meant, of its being false, is all that the statute intends.

As to the possession and the intention of passing, there [* 67] * is no question what is the meaning of the statute; and it only remains to be ascertained what kind of knowledge must be proved against the prisoner, that the paper possessed and intended to be passed was false. Is it a knowledge which he must possess concomitantly with the possession and intention of passing? If this is all, then the indictment in this respect is good, for such knowledge, as has been said, is expressly alleged. But if, to constitute the crime, it is required that the prisoner should have knowledge of the false making, *at the time of the fabrication*, that fact is not charged in this indictment, and the judgment must be reversed.

It would be difficult to assign a reason why such a knowledge as that last mentioned should be required, to constitute the offence It would not, on the one hand, aggravate the guilt of the culprit; nor, on the other, magnify the injury to the public. The malignity of the crime consists in an intention of injuring the community by issues of spurious paper, knowing it to be such; and the guilt is the same, whenever and however a knowledge of its spurious nature may have been obtained. It would also require the proof of a fact of a nature incredible — that a man had a criminal knowledge of the false making, while it was going on, without a combination with the counterfeiters; a fact almost inconceivable; and it would exempt from this punishment the most profligate, who should be proved to have the possession of such paper, an intention of uttering it, and a knowledge of its falseness; provided the knowledge did not commence with the actual making.

It would be very strange if such were the intention of the legislature; and it would require very strong and unequivocal language, to satisfy my mind that was the meaning. But the words of the statute relied upon, " having knowledge of such false making," are insufficient for that purpose; for a man may be truly said *to have knowledge of the false making* of counterfeit paper, although he

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knew * nothing of it at the time it was made. However [* 68] or whenever he knows that it was falsely made, he has knowledge of the false making.

But it is said we are not to presume that any of the words of a statute have been inserted without meaning; and that unless we apply the meaning contended for to the words "having knowledge of such false making," they are wholly insignificant. But it is impossible to read with attention this clause of the statute, without coming to a conclusion, that either these words, or the subsequent words, "knowing the same to be false, altered, forged, and counterfeit, as aforesaid," must be rejected as mere surplusage. The whole clause, so far as respects this subject, runs thus: "having knowledge of such false making, &c., shall willingly aid or assist in uttering or rendering current, as true, any such false, &c., notes, certificates, bills of credit, bank bills or notes, and for that purpose shall possess at any one time not less than ten of such similar, false, &c., notes, &c., *knowing the same to be false, altered, forged, or counterfeited, as aforesaid, with intent,*" &c. Now, if one had knowledge of the false making of any such paper at the time it was made, it is impossible that it should afterwards be in his possession, with the criminal intention of his uttering it, without his knowing that it was false; so that, admitting the construction contended for by the prisoner's counsel, that *having knowledge of the false making* means that he had knowledge *at the time of the making*, it follows of course that the subsequent words, *knowing the same to be false*, &c., *as aforesaid*," are merely nugatory; and then one or the other set of the words must be considered as surplusage; in which case it will be proper to give to the whole such a construction as will give effect to the manifest intention of the legislature; which is to confine to perpetual imprisonment any one who shall deliberately harbor the nefarious intention of becoming a common utterer of counterfeit money.

Besides, a contemporaneous, practical exposition of a * statute affords considerable satisfaction, as to its just con- [* 69] struction. Now, I take the fact to be, as stated by Mr. Solicitor-General, that the form of this indictment is that which has been used in all the prosecutions and trials, which have taken place under this statute for this offence, and that there have been trials, more or less, upon such indictments, before each of the justices of this Court. It is true, that this question has not before now been agitated; but, if the objection is well founded, it is strange that it should not before have occurred.

2. The other objection is, that bills, which the prisoner possessed with the criminal intention alleged, are not averred to be *similar*. —

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It will be necessary to attend particularly to the statute, to determine on the validity of this objection, which depends on the question whether the word *similar* does or does not enter into a description of the offence charged in the indictment.

The two species of paper, relative to which the crime charged upon the prisoner may be committed, are, 1. "Any note, certificate, or other bill of credit, issued by the treasurer or other commissioner or commissioners duly authorized, for any debt of this commonwealth;" 2. "Any bank bill, or promissory note, payable to the bearer, signed in behalf of any company or corporation, by law licensed or authorized as a bank within this commonwealth; or payable, or demandable therein, at the office of any banking company, incorporated by any law of the *United States.*" — The two species, then, are certificates of the public debt of the state and the bank bills, either of this state, or of the *United States, payable within this commonwealth.* If one is possessed of ten such bank bills, with the knowledge and intention expressed in the statute, the crime is complete. The crime, then, may be committed in relation to state notes. But this could never be the case, if the meaning of the word *similar* were such as contended for by the prisoner's counsel. For it is not, from the nature of the [* 70] subject, very probable that any two, much * less ten, of those notes are similar as to the amount, or even the date, and it is not very likely that any counterfeiter would make notes *similar* in those respects, because that circumstance would tend to detect their falseness; nor would it at all aggravate his guilt: and hence it cannot be supposed that the legislature would contemplate such a case as alone to be punished. — What, then, is the meaning of the word *similar?*

This section of the statute has described several offences — counterfeiting notes of our state; counterfeiting bank notes; having in possession a number not less than ten counterfeit state notes, with knowledge that they were counterfeit, and an intention of uttering and rendering them current as true; and having in possession not less than ten counterfeit bank notes, either of the banks of this state, or of the *United States* payable in this state. And after having grouped these several offences together, the act proceeds to prescribe the same punishment for each offence. Had the statute been less complicated — that is, had the several species of paper mentioned been kept distinct — what may we reasonably presume would have been the provisions? It would have provided, that if any one should falsely make, &c., any note, &c., issued by the treasurer, &c., for a debt of the state; or, if any person should have in his possession a number, not less than ten, of such false

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notes, knowing them to be false, and intending to utter and render them current, he should be punished as is provided. The same provision with regard to any counterfeit bills, signed in behalf of any company or corporation by law licensed and authorized as banks within this commonwealth; and also with regard to the bills of the Bank of the United States payable in this state. — The offence, then described in the statute, and charged against the prisoner, is that of having in possession ten counterfeit bank bills of one of the banks mentioned in the act. The whole purpose and effect of the word *similar*, then, is, that of distribution to the several subjects of the section, and it does * not at all enter into [* 71] the description of the offence. In this view, the indictment brings the case of the prisoner within the act — the bills were more than the requisite number, and of the same bank.

The same objection, as the last which has been considered, occurred in the case of a conviction before the *Chief Justice* in *Middlesex*. It is true it was not argued, but it was maturely considered by him, and judgment was afterwards rendered on the conviction.

But it is said that, according to the construction which I have given, the offence charged against the defendant is the same as that described in the fourth section. — That section provides a different punishment for any person, who brings into, or has in his possession within the state, *any* false, forged, or counterfeit *bill* or bills, of any bank within this state, or *in any other part of the United States*, for the purpose of rendering the same current as true, or with intent to pass the same, knowing the same to be false, forged, or counterfeit. — Without mentioning any other differences, it is sufficient to observe, that to constitute the crime described in the former, the possession of at least *ten* bills is necessary; whereas the possession of *one* only, is sufficient to constitute that described in the latter.

The sixth section was cited to show that the word *similar* ought to receive the construction contended for in the second section. The sixth section makes provision relative to counterfeiting gold *or* silver coin; and the criminal possession of it, with knowledge of its falseness, and an intention of rendering it current.

The same reasoning, which has been employed to show the meaning of that word in the second section, would show that it ought to receive the same construction in the sixth; that the whole purpose and effect of it is, to distribute the provisions of the section to its respective subjects; and that it does not at all enter into a description of the crime. To be convicted of the crime, the prisoner must be proved to have had in his possession at least ten gold pieces, or ten silver pieces.

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[* 72] * Can any other be the intention of the statute? Suppose a man has nine counterfeit Eagles, nine half Eagles, and nine of every other description and denomination of gold current in the commonwealth, with the knowledge and intention mentioned in the statute; is it possible to suppose that the legislature did not intend that he should be punished for the crime described in the sixth section? — Again, suppose one is proved to have had in his possession nine of every denomination of bills of every bank in the commonwealth; would it not be monstrous to say, that he was not guilty of the offence described in the second section?

It is the unanimous opinion of the Court, (including *the Chief Justice*, who was present at the argument, and has since been conferred with on the subject,) that the prisoner can take nothing by his writ, and that the judgment must be affirmed.

Judgment affirmed.

COMMONWEALTH *versus* ETHAN A. CLARY.

The courts of the commonwealth cannot take cognizance of offences committed upon lands in the town of *Springfield*, which have been purchased by the U. States for the purpose of erecting arsenals, &c., to which the consent of the commonwealth was granted by the statute of 1798, c. 13.

THE defendant was indicted at the Court of Common Pleas for this county, November term, 1809, for selling spirituous liquors within the town of *Springfield*, in this county, against the form of the statute, &c.

The indictment contained three counts, charging the defendant with three distinct offences in selling rum to three several persons.

Upon a trial had in the court below, he was convicted, and sentenced to pay a fine and costs. From that sentence he appealed to this Court, having agreed on record that, in any future stage of the proceedings, he would admit the selling of the rum, as charged in the first and third counts of the indictment; and the attorney prosecuting for the commonwealth having entered a *nolle prosequi* as to the second count,

[* 73] * The cause was submitted to the opinion of the Court upon the following facts, stated and agreed by the defendant and the counsel for the commonwealth.

"Before and at the time of the adoption of the constitution of the *United States*, there were standing in the town of *Springfield*,

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and on land owned by said town, divers buildings erected and occupied by the *U. S.* as arsenals, in which they then had, and always since have had, large quantities of guns and other military stores; and one building erected by the *U. S.* and occupied by them as a powder magazine. After the passing of the law of the *U. S.* of April 2d, 1794, providing for the erecting and maintaining of arsenals and magazines, and for other purposes, viz., on the 22d of June, 1795, one *N. Patten* conveyed certain land on *Mill River*, in said *Springfield*, to the then secretary of state, in trust for the *U. S.*, on which they erected, and have ever since maintained, buildings suitable for manufacturing small-arms; and have occupied the same for performing parts of the labor in making small-arms; and ever since the year 1794 have occupied other buildings, near to the said military stores and magazine, for performing other parts of the labor in making small-arms; said last-mentioned buildings having been erected by the *U. S.* before that time on land owned by the town of *Springfield*. — On the 14th of May, 1798, the *U. S.* by law authorized the president, in case he should think proper, to take by lease, or to purchase in fee, lands, and erect founderies for cannon, and armories for making small-arms. On the 25th of June, 1798, a law of this commonwealth passed, giving the consent thereof that the U. S. might purchase a tract of land in *Springfield*, not exceeding six hundred and forty acres, for the sole purpose of erecting forts, magazines, arsenals, and other needful buildings, the evidence of the purchases to be recorded in the registry of deeds for the county of *Hampshire*. On the 19th of September, 1798, *John Ashley*, by his deed duly recorded as aforesaid, conveyed to the *U. S.* in fee a parcel of land on *Mill River*, so called, *in [*74] said *Springfield*, on which the *U. S.* the same year erected, and have ever since kept and occupied, large and suitable buildings and machinery for making small-arms. On the 24th of August, 1801, the said town of *Springfield*, by their deed duly recorded as aforesaid, conveyed to the *U. S.* a parcel of land in said town, on which the military stores before mentioned then stood, on which also then stood divers other buildings, some of which, ever since the year 1794, have been occupied by the *U. S.* for the manufacture of small-arms, and also another small piece of land, on which then stood and still stands the said powder magazine. On the 9th of January, 1809, *James Byers*, by his deed duly recorded, conveyed to the *U. S.* another parcel of land in said town, lying also on *Mill River* aforesaid, on which, before the time of committing the supposed offence alleged in the indictment, there were erected by the *U. S.* divers buildings suitable for the manufacture of small-arms, and several dwelling-houses occupied by the artificers employed in

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the said manufactures by the *U. S.* The said several parcels of land are separate and distant from each other, and do not contain in the whole 640 acres; and a line may be so drawn as to enclose the whole of them, and not to contain within the same more than 640 acres. The said parcels of land lying on *Mill River* have not been occupied by the *U. S.* as arsenals, but as parts of an armory; and the two pieces conveyed by the town of *Springfield* have, ever since the year 1794, been occupied by the *U. S.* as well for arsenals and magazines as for parts of an armory.

The said *Clary*, at the several times set forth in the first and third counts of the indictment, did sell, as therein mentioned, to the several persons therein named, the said spirituous liquors, without license therefor first had and obtained from the Court of Common Pleas for said county. But he was at the said several times employed as an overseer of one of the water-shops owned by the *U. S.*, and sold the said liquors in a dwelling-house erect-
[* 75] ed by the * *U. S.* on the said land purchased by them of *James Byers*, to the said persons, by the permission and approbation of *Benjamin Prescott*, superintendent of the armory of the *U. S.* in *Springfield*."

If the Court, upon the whole matters aforesaid, are of opinion that the said *Clary* is guilty, as charged in the first and third counts of the indictment, judgment was to be rendered thereon against him; otherwise he was to be acquitted and discharged.

The defence relied on was, that the offence charged was committed within a territory over which the laws of the *United States* had exclusive jurisdiction; that the laws of the commonwealth had no operation therein; and of consequence that the defendant was not bound to answer for the offence in the courts of the commonwealth.

Bliss, for the commonwealth, contended, 1. That the jurisdiction given to congress by the constitution of the *U. S.* [Art. 1, § 8,] "over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of *forts, magazines, arsenals, dock-yards, and other needful buildings*," cannot be fairly construed to extend to a place for *manufacturing arms*; arsenals and magazines being places suited to deposit them in, but not for manufacturing them; and there is no necessary connection between them. The law of the commonwealth passed June 25th 1798, giving consent to the purchase of a tract of land for the *sole* purpose expressed in the constitution, ought not to be extended beyond its necessary import. It is a grant, and must be construed strictly; and a grant of jurisdiction should be taken more strictly than any other.

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2. The consent of the commonwealth was given to the purchase of "a tract of land in *Springfield*, not exceeding 640 acres," and not of a number of separate and detached parcels, the whole of which should not exceed that quantity. The evils of the latter construction are obvious. One man's house will be within the commonwealth, and his next * neighbor's out of it. [*76] Such, indeed, is the case at present, if this construction prevails; there being three or four parcels of the land of the *U. S.* on which there are dwelling-houses, and others very near them, not on those lands.

3. The two parcels of land purchased of *Ashley* and *Byers* must have been purchased under the law of the *U. S.* passed May 4, 1798, authorizing the president to purchase lands for manufacturing arms, and not under the provision of the constitution relative to arsenals; and by this law jurisdiction could not be acquired by congress.

It may also be observed that the congress have never exercised jurisdiction over the armory, as must have been the case, had they the sole right of legislating for it. On the other hand, the commonwealth has uninterruptedly exercised jurisdiction, and, it is submitted, ought to continue it, until congress or the *U. S.* claim and exercise it.

There can be no pretence that the superintendent of the armory, as such, had any power to license the sale of spirituous liquors to the armorers. Those liquors were not the property of the *U. S.* but of the defendant, and were sold for his emolument. The *U. S.*, in fact, furnished spirits, with other rations, to these armorers, as well as to their other laborers, by those who had contracted to furnish them; and they were dealt out on the tract conveyed by the town of *Springfield*, and not on this tract.

The action stood continued *nisi* for advisement; and at the following March term in *Suffolk*, the *Chief Justice* delivered the opinion of the Court, to the following effect: —

On the facts agreed in this case we are of opinion, that the territory, on which the offence charged is agreed to have been committed, is the territory of the *United States*, over which the congress have the exclusive power of legislation. The assent of the commonwealth to the purchase of this territory by the *United States*, had this condition annexed to it — that civil and criminal process might be served therein by the officers of the commonwealth. This condition was made with a view to prevent the territory * from becoming a sanctuary for debtors and crim- [*77] inals; and from the subsequent assent of the *United States* to the said condition, evidenced by their making the pur

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chase, it results that the officers of the commonwealth, in executing such process, act under the authority of the *United States*. No offences committed within that territory, are committed against the laws of this commonwealth; nor can such offences be punishable by the courts of the commonwealth, unless the congress of the *United States* should give to the said courts jurisdiction thereof.

As a consequence of these positions, it is the opinion of the Court, that they have no cognizance of the offences charged in this indictment, and that the defendant must be discharged.

An objection occurred to the minds of some members of the Court, that if the laws of the commonwealth have no force within this territory, the inhabitants thereof cannot exercise any civil or political privileges, under the laws of *Massachusetts*, within the town of *Springfield*. We are agreed that such consequence necessarily follows; and we think that no hardship is thereby imposed on those inhabitants; because they are not interested in any elections made within the state, or held to pay any taxes imposed by its authority, nor bound by any of its laws. — And it might be very inconvenient to the *United States* to have their laborers, artificers, officers, and other persons employed in their service, subjected to the services required by the commonwealth of the inhabitants of the several towns.

It will be noticed, that in this decision we make a distinction between persons who actually dwell within the territory owned by the *United States*, and the laborers and artificers employed therein, who have their dwelling elsewhere.

Ashmun for the defendant.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF WORCESTER, SEPTEMBER TERM, 1811, AT WORCESTER.

PRESENT:

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. THEODORE SEDGWICK, HON. SAMUEL SEWALL, HON. ISAAC PARKER, } JUSTICES.

COMMONWEALTH *versus* THOMAS MOREY.

A justice of the peace cannot require one to find sureties of the peace but until the next court; nor can he sentence one to pay costs, whom he so recognizes.

UPON the motion of *Lincoln*, a writ of *habeas corpus* issued to the sheriff, returnable *instanter*, commanding him to bring in the body of *Thomas Morey*, a prisoner in the county jail, with the cause of his commitment. — The sheriff returned a copy of a *mittimus* or warrant of commitment, issued by one *Bottom*, a justice of the peace for this county, in which it was recited that *Morey* had been brought before him on the complaint of one *J. P.*, and had thereupon been "required to find sureties to be bound with him in a recognizance, to keep the peace, and to be of the good behaviour towards all the citizens of the commonwealth, for and

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during one full year from the date hereof, and in the mean time to behave himself well towards *J. P.* aforesaid, and also to pay costs of prosecution," and that he had refused to find sureties; whereupon the justice committed him, until he should find such sureties, or be discharged according to law.

[*79] *Upon the return being read and filed, *the Court* immediately discharged the prisoner, observing that the order of the justice for disobedience to which he had been committed, was illegal, as well in requiring him to pay costs, as in demanding sureties of the peace for a year, instead of ordering him to recognize for his appearance at the next term of the Common Pleas, and in the mean time to keep the peace, &c.

See *Commonwealth* vs. *Ward*, 3 *Mass. Rep.* 417.

JOHN ALBEE *versus* THOMAS W. WARD.

In case against the sheriff for neglect of his deputy in the service of an execution issued by a justice of the peace, in the plaintiff's favor, upon a recognizance taken pursuant to the statute of 1782, *c.* 21, by which the plaintiff lost his debt: where the execution misrecited the recognizance, both as to the sum in the recognizance, and as to the time of entering into it, it was held that no action lay against the sheriff.

CASE against the defendant, sheriff of the county of *Worcester*, for the neglect of his deputy in not serving a writ of execution.

The declaration contained four several counts, each of them in substance stating the following facts, viz. On the *seventh* day of *March*, one thousand eight hundred and *five*, *John Chamberlain*, before *Sylvanus Towne*, Esq., a justice of the peace for the county of *Worcester*, entered into a recognizance to the plaintiff in the form prescribed by the statute of 1782, *c.* 21, whereby he acknowledged himself to be indebted to the plaintiff in the sum of five hundred and three dollars, and *seventy-five cents*, to be paid on the 25th day of June, 1805.†

On the 5th day of February, 1806, the same justice issued an execution in the form prescribed for an execution on a recognizance, which was directed to the sheriff or his deputy. — After reciting that

† The figures in the original were so ill written, that a question was made whether 1805, or 1806, was intended.

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John Chamberlain, on the *twenty-fifth* day of *June*, in the year eighteen hundred and five, acknowledged that he was indebted to the plaintiff in the sum of *five hundred and three dollars*, which ought to have been paid on the 25th day of June, (without mentioning any year,) the execution proceeds in the form prescribed by the statute, and is dated the 5th day of February, 1806.

On the day last mentioned, the plaintiff delivered *the [*80] execution to one *Leonard Conant*, then a deputy of the defendant, to be duly executed and returned. *Conant* afterwards levied the same on an equity of redemption which *Chamberlain* then had in two certain pieces of land, advertising them for sale at auction on the 31st day of March following, on which day he adjourned the sale to the 5th day of April then next, when he sold the said equity of redemption to the highest bidders. — There is then an averment that *Conant* was not authorized by law to adjourn the sale for a longer term than three days; and by reason of his illegal adjournment the sale was void; and that *Chamberlain* has since become insolvent, and has absconded out of the commonwealth; by reason of which misfeasance of *Conant*, the plaintiff has wholly lost the benefit of the said recognizance and execution.

The defendant demurred to each count; and assigned as causes of demurrer, 1. That the execution recited does not comport with the recognizance recited, either as to the date of the recognizance, or the principal sum therein mentioned. 2. That the execution does not state in what year said recognizance was made.

The cause was argued at the last September term in this county, by *Bangs* and *Blake* for the plaintiff, and by *Bigelow* and *Lincoln* for the defendant.

In support of the demurrer, it was contended that the defects in the execution operated to make it void, and that the officer was therefore neither required nor authorized to serve it; and that the defendant may avail himself of those defects in the present action.

The execution was void, as not grounded on any recognizance; or, in other words, there was no such recognizance as was described in the execution. This was wholly a statute proceeding, and if the execution did not follow the statute prescription, it issued without any authority, and was merely void. Another execution, conformable to the recognizance, might have issued the next day, and the officer, to whom it should have been delivered, would have *been bound at his peril to execute it. But it can [*81] never be said that the conusor was liable to make two satisfactions for the same debt.

That the officer has a right to avail himself of this defence,

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the counsel for the defendant cited the authorities in the margin. (1)

For the plaintiff, it was said that the recital of the recognizance in the declaration was unnecessary and mere surplusage; and although the execution did not pursue the recognizance, yet the issuing such an execution was within the justice's jurisdiction, and *non constat* but there might be another recognizance, to which the execution delivered to the officer might conform.

But, allowing the execution to contain two mistakes, one as to the day of entering into the recognizance, and the other an omission of seventy-five cents in the amount of the debt; this is merely erroneous, and the officer cannot avail himself of it to excuse his neglect. (2) Executions upon recognizances under this statute have all the effects and properties of executions issuing upon judgments of a court of common law. If the clerk of such a court should issue an execution for seventy-five cents less than the judgment, is the sheriff excused from serving such execution? The justice of peace under this statute becomes a court of record. The statute gives a *scire facias* upon the recognizance in certain cases; and error will lie to set aside an execution issued upon it. (3)

For the defendant, in reply. Suppose error brought to annul this recognizance; it could not affect the execution, because that did not issue upon the recognizance. The demurrer cannot be taken to concede that fact. — If the officer had made a regular service of the execution, it would not have benefited the plaintiff, for it was void, and he could derive no title under it, more than if there had been in fact no recognizance at all.

The action stood over to this term for advisement; and now the opinion of the Court was delivered by

[*82] *SEDGWICK, J. It is not necessary distinctly to notice the several counts and demurrers presented by this record; because the same material facts appear in each, and the same principles and conclusions are applicable to them all.

As to the objection, arising from the uncertainty of the year when the recognizance was entered into, as it is said to be described in the original execution, I make no account of it in the opinion

(1) *Cro. Car.* 162, *Walker* vs. *Riches*. — 2 *Salk.* 700, *Shirley* vs. *Wright*. — 7 *Mod* 29. *S. C.* — 2 *L. Raym.* 775, *S. C.* 11. — *Mod.* 50, *Luttin* vs. *Benin*. — 2 *Burr.* 966. — 8 *D. & E.* 153, *Paris* vs. *Wilkinson*. — *Com. Dig. Execution*, I. 3. — *Bac. Abr. Execution*, C.

(2) 2 *Saund.* 101, *Jaques* vs. *Cesar*. — *Carth. Rep.* 148. — *Cro. Eliz.* 576, *Coniers Sheriff of Durham's case*. — *Ibid.* 165, *Ognell* vs. *Paston*. — *Ibid.* 188, *Bushe's case*. — *Ibid.* 271, *Richbell* vs. *Goddard*. — *Cro. Jac.* 3, *Weaver* vs. *Clifford*. — *Cro. Eliz.* 893 *Colston* vs. *Ross & Al.* 1*st point*. — *Esp. Dig.* 656.

(3) 4 *Mass Rep.* 484, *Johnson* vs. *Harvey*.

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which I give. Let it have been intended to express the year 1805 or 1806, the variance between the time of entering into the recognizance, as alleged in the execution, and the true time, will be equally irreconcilable. — The true time was the *seventh* of *March*, 1805; that stated in the execution, the *twenty-fifth* of *June*, either 1805 or 1806. Yet it may be noticed, that if the justice, when he issued the execution, meant to write 1806, the time would have been impossible; because it had not arrived at the date of the execution.

In all the counts it is alleged, that the execution issued upon the recognizance; and by the demurrer every thing that is well set forth, — every pertinent and reasonable allegation, which it was competent for the plaintiff to make, — must be considered as true. Will, then, the allegation, that the execution issued on the recognizance set forth, between which there are material variances as to times and sums, so validate the execution, as to take from the sheriff all excuse for not serving it?

The time of entering into the recognizance was on the seventh of March, 1805. The time stated in the execution was the twenty-fifth of June, either 1805 or 1806. The sum acknowledged to be due, five hundred and three dollars and *seventy-five cents*, and the sum said in the execution to have been acknowledged to be due, five hundred and three dollars, the seventy-five cents being omitted.

In addition to this, the execution states no time when the debt ought to have been paid.

It will be important to consider in what circumstances, in relation to this subject, these parties, I mean the conusor [*83] *and conusee, would have been, if the execution had been paid and satisfied, either by compulsion or voluntarily. Suppose that to have been done, and the creditor to have brought an action of debt upon the recognizance, could the defendant in such action have availed himself of the payment, by pleading it in bar of the action? — The payment of the execution would show that a recognizance entered into on the *twenty-fifth* day of *June*, for five hundred and three dollars, payable on the 25th of June, (without mentioning any year,) had been paid. Would it have been competent for the defendant, in such a case, to prove that the recognizance, on which the execution issued, was in fact entered into on the *seventh* day of *March*, and for the sum of five hundred and three dollars and *seventy-five cents*, and payable on the twenty-fifth day of June, *one thousand eight hundred and five*? This question must be decided by the known rules of pleading, and the proof required on trial, to support affirmative allegations.

In such a plea the defendant must have alleged, that the recog-

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nizance set forth in the execution which had been paid, and that on which the action was brought, were the same, and not different; and that allegation must be supported by evidence. Would evidence to that purpose be admissible?

It is indeed a contradiction in terms, to say that a recognizance, entered into on the *seventh* day of *March*, is the recognizance that was entered into on the *twenty-fifth* day of *June*; or that a recognizance for five hundred and three dollars and *seventy-five cents*, and one for five hundred and three dollars, are the same. And in such a case, the burden of proving the affirmative allegation, that the recognizance paid and that on which the action was brought were the same, would have rested on the defendant. This fact could not be proved by parole evidence; for it is a well-known rule of law, that parole evidence is not admissible to vary the meaning of a deed, or to explain that which is apparent upon the face of it. Now, a recognizance is a * deed, and something more; it is a contract of a most solemn nature; and an execution which issues upon it, as to the power which it confers, and the duty which it imposes upon an officer, are of the same nature, as in case of an execution which issues from a court of record. From hence it appears, that it would not be competent for the defendant in the case supposed, to prove that the execution which issued, was in fact intended to be issued, upon the recognizance set forth; because this would be, either to vary the recognizance, and make it comport with the execution; or, what is quite as much beyond his power, to vary the execution, and make it comport with the recognizance.

[* 84]

Besides, a justice of the peace, in taking a recognizance, and in issuing an execution, exercises no judicial power; but acts merely as a ministerial officer. In the latter respect, the statute declares that "he shall award and make out, *on such recognizance*, a writ or process of execution." On the recognizance *which he takes* only is he authorized to award an execution. Now, in this case, the justice did not award an execution on the recognizance which he had taken. He has awarded no execution on a recognizance taken in *March*, nor on a recognizance taken for five hundred and three dollars and *seventy-five cents*. And the execution which he did issue, upon a recognizance said to have been taken in *June*, but which never was taken, was issued without any authority. Such an authority must be strictly pursued; but here the authority was not at all pursued: the variances were material.

But had the officer proceeded to execute the writ, the conusor, *Chamberlain*, would not have been without his remedy. He might have brought his action against the plaintiff, and, I think, against

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the justice. If a *fieri facias* be not warranted by the judgment on which it is awarded, though the sheriff shall be excused for executing it, yet as to the party it is merely void. (4) A judgment on which an execution issued is vacated; and although the
* officer is excused for executing the writ, yet an action [* 85]
can be maintained against the party. (5) And trespass will lie against a plaintiff who has sued out a void writ. (6)

The case under consideration is at least as strong as either of those which have been mentioned; and the *gravamen* of the plaintiff, of consequence, is that the officer did not do that which could have been of no benefit to him, but, on the contrary, would have subjected him to an action of trespass. Had the execution proceeded, and had *Chamberlain* brought an action against the present plaintiff, if he could not have shown (and it would have been impossible) a sufficient warrant for it, the action would have been maintained. In this case, then, the plaintiff has sustained no injury by the default which he charges against the sheriff; and it appears to me, that whenever that certainly appears to be the case, no action can be supported.

In the case of *Alexander* vs. *Macauly & Al.*, (7) it was determined, on the authority of that of *Gunter* vs. *Clayton*, (8) that in an action against the sheriff for the escape of a prisoner on mesne process, if the plaintiff cannot prove any debt against the prisoner who escaped, he must be nonsuited, and cannot recover even nominal damages. Innumerable cases have been determined, involving this principle.

In *Dr. Drury's case*, (9) it was determined, that if an escape be suffered, and afterwards the judgment, on which the prisoner was committed, be reversed, an action cannot be maintained for the escape, but that the sheriff may plead *nul tiel record*. And in the case of *Jones* vs. *Pope*, (10) it was determined, that in an action for an escape of one committed upon an execution, it was necessary for the plaintiff to show a judgment, on which the *ca. sa.* issued; for otherwise the plaintiff had lost nothing by the escape. — A writ of execution, in the case of a common person, must in *England* bear test in term time; but if tested out of term time, it will
justify a sheriff in executing it; but as it is void to * every [* 86]
other purpose, no action can be maintained against the sheriff, if he lets the prisoner escape. (11) And if one escape on a *capias ad respondendum* returnable after an intervening term, and

(4) *Vent.* 259. (5) *Sir T. Raym.* 73, *Turner* vs. *Trelgate.* — 1 *Lev.* 95, *S C*
(6) 3 *Wils.* 341, *Parsons* vs. *Loyd.* — 2 *W. Black.* 845, *S. C.*
(7) 4 *D. & E.* 611. (8) 2 *Lev.* 85. (9) 8 *Co.* 142. (10) 1 *Saund.* 37
(11) *Salk.* 700. — 7 *Mod.* 30. — *L. Raym.* 775. — *Bac. Abr. Execution*, C.

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permitted to go at large, no action for an escape will lie, because such a writ ought to have been issued. (12) Indeed it may be laid down as universally true, that whenever the process, by virtue of which one is arrested, is void, no action can be supported for his escape.

It is true, that if the proceedings on the judgment, on which process is founded, are merely erroneous, and not void, the officer cannot, for that reason, excuse himself for disobeying the precept; and the true reason I conceive to be, that, from very wise considerations, the court will not thus collaterally and incidentally correct errors. But on the other hand, if it appears that the judgment is *void*, it is otherwise; and the reason on which this principle of law is founded, it seems to me, applies with great force to the case under consideration. For surely he who has nothing at all to authorize the issuing of an execution in his favor, (as in this case,) has not more reason to complain that it is not served, than he who has an ostensible debt by a void judgment.

To prove that a sheriff is excused for suffering a prisoner to escape, who is taken by an execution issued on a void judgment, the case of *Squibb* vs. *Hole*, before cited, is directly in point.

That was an action for an escape. The plaintiff declared, that he prosecuted one *J. S.*, in the court of *Ely*, on a bond made *infra jurisdictionem* of that court, and that the debtor was taken by the defendant, who suffered him to escape. The defendant in the original action had appeared in the court below, and admitted the jurisdiction, by pleading *non est factum*; but it appeared, by a special verdict taken on the trial, that in fact the bond was not made within the jurisdiction of the inferior court. As, in a court of inferior and local jurisdiction, its proceedings on subjects
[* 87] * not arising within their jurisdiction, and its judgments on them, are void, judgment was in this case rendered in favor of the defendant. And the true reason was, that as the judgment in the inferior court was *void*, the plaintiff had no just ground for complaint, that the person of the original defendant was not holden in custody by the execution. Whether the principle, on which the court must have proceeded, was properly applied in this case, — in other words, whether it was competent for the officer to show, that the cause of action arose out of the jurisdiction of the inferior court, after it had been admitted by the original defendant, — may perhaps be doubted, from the authority of *Higginson* vs. *Sheif*, (13) and of *Luttin* vs. *Benin*; (14) but it does not at all af-

(12) 2 *Mod.* 29, *Squibb* vs. *Hole*. — 1 *Freem.* 193, *S. C.*
(13) *Com Rep.* 153. (14) 11 *Mod.* 50 — *Salk.* 201, *S. C.* — *Holt*, 186, *S. C*

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fect the principle, that whenever it does appear to the court, that the plaintiff has suffered nothing by that conduct of the officer, of which he complains, no action can be maintained; and why should it?

Now, in this case, it has already been shown that no benefit could have resulted to the plaintiff, if the officer had proceeded to execute the execution issued by the justice; and from thence I conclude, as well from reason as from a concurrence of all the authorities, that this action cannot be maintained.

Declaration adjudged bad.

COMMONWEALTH *versus* ASA JOHNSON, ESQ.

Offences against the statute of 1791, c. 58, for the due observation of the Lord's day, are not originally cognizable in this Court.

THE defendant was indicted at the last September term of this Court in this county, for travelling on the ninth day of the same September, the same being Lord's day, and the same travelling not being from necessity or charity, against the peace, and the form of the statute in such case made and provided.

At the last April term, upon his arraignment, he filed the following plea to the jurisdiction of the Court.

"And the said *Asa*, in his proper person, comes and defends the force and injury, &c., and says that the Court
* here ought not to take further cognizance of or sustain [* 88]
the indictment aforesaid, because he says the offence therein charged, if any has been committed, is within the jurisdiction of a justice of the peace, or the Court of Common Pleas for said county of *Worcester*, and not within the jurisdiction of the Supreme Judicial Court, and this he is ready to verify; wherefore he prays judgment, if this honorable Court will take further cognizance of," &c.

The solicitor-general for the commonwealth demurred generally to this plea, and the defendant joined in demurrer; whereupon the cause stood over to this term for argument, when it was shortly spoken to by the *solicitor-general* for the demurrer, and *Lincoln* in support of the plea. The cause was then continued *nisi* for advisement, and at the following March term in *Suffolk*, the opinion of the Court was delivered by

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SEDGWICK, J. The defendant's plea is grounded upon, and, if good, must be supported by the 13th section of the statute 1791, c. 58, wherein it is enacted "that all the offences, the penalties against which exceed *forty shillings*, *shall be* prosecuted by presentment of the grand jury, before the Court of General Sessions of the Peace, [by statute of 1803, c. 155, the Court of Common Pleas,] in the county wherein the offence may be committed; but all offences, the penalty whereof does not exceed *forty shillings*, (except the offender lives out of the county in which the offence may be committed,) *shall be* prosecuted by a complaint before a justice of the peace in such county. But when the offender lives out of such county, he may be prosecuted by presentment as aforesaid, although the penalty does not exceed *forty shillings*."

Now, as all the penalties, which may be incurred by a breach of this statute, are pecuniary, it is manifest that there is no case in which the Common Pleas, or a justice of the peace, have not jurisdiction of the several offences therein enumerated and described. — Whether they have *exclusive* jurisdiction, is the question
* 89] presented by the pleadings. — *To determine this question, it will be necessary to ascertain the powers of this Court.

By the provincial act of 11 *Will.* 3, c. 3, there was established a Superior Court of Judicature, &c., within the province of *Massachusetts Bay*, which was "to have cognizance of all pleas, real, personal, and mixed, as well as all pleas of the crown, and all matters relating to the conservation of the peace and punishment of offenders; as civil causes, or actions between party and party, and between his majesty and any of his subjects, whether the same do concern the realty, and relate to any right of freehold and inheritance, or whether the same do concern the personalty, and relate to matter of debt, contract, damage, or personal injury; and also all mixed actions, which concern both realty and personalty, brought before them by appeal, review, writ of error, or otherwise, as the law directs; and generally of all other matters, as fully and amply, to all intents and purposes whatsoever, as the courts of King's Bench, Common Pleas, and Exchequer, within his majesty's kingdom of *England*, have or ought to have."

After the adoption of our state constitution, which gave the style or title of "The Supreme Judicial Court," it was, to prevent doubts which might arise, expressly enacted by the statute of 1780, c. 17, § 1, that the court, which had been, or should be thereafter, appointed and commissioned according to the constitution, as the Supreme Judicial Court of this commonwealth, should have cognizance of all such matters as had theretofore happened, or that

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should thereafter happen, as by particular laws were made cognizable by the late Superior Court of Judicature, &c., unless where the constitution and frame of government had provided otherwise.

Afterwards, by the statute of 1782, c. 9, § 1, establishing a Supreme Judicial Court in this commonwealth, the most ample jurisdiction is given to this Court in all matters of a civil nature; and in words very similar to those afore cited from the statute 11 *Will.* 3. The words used to describe * its jurisdiction in [* 90] criminal cases are, "and shall take cognizance of all capital and other offences and misdemeanors whatsoever of a public nature, tending either to a breach of the peace, or the oppression of the subject, or raising of faction, controversy, or debate, to any manner of misgovernment; and of every crime whatsoever that is against the public good."

These last-recited words, viz. "*and of every crime whatsoever that is against the public good,*" are, independently considered, amply sufficient to give to this Court *original* jurisdiction in all cases of crimes, whether at common law or by statute; and whether the offence had previously been, or should be thereafter created by statute. And unless *this* jurisdiction is or has been taken away from this Court by some act of the legislature, the defendant's plea is bad.

I have before observed on what grounds his plea must be supported, if it can be supported at all. It is necessary, then, to ascertain, whether the words in the thirteenth section of the statute above recited are sufficient to oust the jurisdiction of this Court. To determine this point, it is not perhaps necessary to recur to *English* authorities. For I admit that the rule in *England* is, that by nothing but express words, negative words, — or, as in some late cases is admitted, necessary implication, can the Court of King's Bench be ousted of its jurisdiction. And probably *there*, upon the construction of the words similar to those now under consideration, that court would decide that the words, being merely affirmative, were insufficient for that purpose. Now, without undertaking to determine whether these words do or do not necessarily imply a negative, (although perhaps every man unshackled by technica and artificial reasoning would say that they do,) nor, consequently, whether the courts in *England* have or have not been correct in their interpretation of such words; it will perhaps be sufficient for the decision of the present case, to show that words similar to those now under consideration * have in this state, by [* 91] a long-continued, unbroken series of precedents and practice, been uniformly construed to exclude the *original* jurisdiction of this Court.

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By a recurrence to the words above cited, describing the powers of the late Superior Court of Judicature, &c., it is obvious that there is no conceivable case, in which *that* court had not jurisdiction, as fully and amply as the Court of King's Bench in *England*. How, then did it happen that *that* court never exercised original jurisdiction in that vast variety of *civil* actions, which are *originally* cognizable in the King's Bench? — The provincial act of 13 *Will.* 3, c. 11, furnishes the answer. It enacts "that all civil actions, other than such as are cognizable before a justice of the peace, *shall be originally* heard and tried in an inferior Court of Common Pleas; except in suits where the king is concerned, which may be brought in any of his majesty's courts within this province, at the pleasure of the prosecutor." Here, then, we find that mere affirmative words, not more definite nor imperative than those used in the statute upon which this indictment was found, have been uniformly, and, as far as can now be ascertained, without exception, construed to oust the jurisdiction of the Superior Court of Judicature. And can there be assigned any reason, why the same words, or words precisely alike in their common and ordinary acceptation, should be construed to have diverse and even contrary significations in their several applications to the cognizance, either of civil actions or criminal prosecutions? It seems to me that the supposition is absurd.

I here anticipate, and will obviate an objection, which may possibly be made, *viz.* In the one case, (that of civil actions,) the words are, "shall be *originally* heard," &c., which *necessarily imply* an exclusion of the *original* jurisdiction of the Superior Court; whereas, in the other, (prosecutions on this statute,) the words are, "shall be prosecuted," &c.; and that, therefore, the cases are not similar.

[* 92] *To my mind, an answer to this objection may be derived from a very slight attention to the statute itself. These words, "shall be prosecuted," &c., are twice used in the thirteenth section, as above recited. In the first place, then, it will not be denied that jurisdiction, some sort of jurisdiction, is given by the statute, in certain specified cases, to justices of the peace, and in others to the Courts of Sessions. That justices of the peace would have no jurisdiction at all in those specified cases, were it not expressly given by the statute, — and that they have not, nor ever had any other than *original* jurisdiction in any case, — are positions that will not be denied. The unavoidable consequence is that, as applicable to *their* authority, the words used do, by necessary implication, give original jurisdiction.

Again, the same words, it will be acknowledged, give to the

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Sessions jurisdiction, some kind of jurisdiction, in certain *other* specified cases. Now, unless the words give to the Courts of Sessions *original* jurisdiction, I would ask, what kind of jurisdiction do they give? Surely not a jurisdiction which they have in cases of appeal from the judgments of justices of the peace in criminal prosecutions, given by statute in all cases; because these specified cases, in the statute under consideration, are not cognizable by justices of the peace. And will it be said, that the Courts of Sessions have power and authority, by writ of error, *certiorari*, &c., to correct the errors and superintend and control the proceedings of justices of the peace? — Every one knows that this is to be done in this Court, and in no other in the state. The words, therefore, in these cases, do, by necessary implication, give *original* jurisdiction to the Court of Sessions.

So well established is the rule *here*, that civil actions *must be originally* commenced in the Court of Common Pleas, that although, since the adoption of our state constitution, on a revision of the statutes relative to the judicial courts, and which define or describe their powers, authorities, and duties, there is not any provision that * civil actions *shall be* commenced in the Court [* 93] of Common Pleas, (the successor of the inferior Court of Common Pleas) but merely that the Court of Common Pleas "*shall have cognizance of all civil actions of the value of more than forty shillings*," &c., yet no one, it is believed, has attempted to commence any such action *originally* in this Court; excepting only in those cases where there has been a special provision by statute for that purpose. The practice, since the adoption of the constitution, is probably grounded on the sixth section of the sixth chapter, which declares that "all laws, which have heretofore been adopted, used and approved in the province, colony, or state of *Massachusetts Bay*, and usually practised on in the courts of law, shall still remain and be in force, until altered or repealed by the legislature, such parts only excepted, as are repugnant to the rights and liberties contained in this constitution."

None of the foregoing considerations, it will be noticed, have the least tendency to take away the general superintending power of this Court over all inferior jurisdictions, in cases coming before it by appeal, *certiorari*, writ of error, or otherwise, as the law provides. But, taken together, they appear to my mind sufficient to authorize the conclusion, in which we are all agreed, that this Court has not *original* jurisdiction in the case before us.

Per Curiam. The defendant's plea is sufficient, and therefore let him be discharged of the said indictment, and go thereof without day.

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JOSIAH PEASE, JUN., *versus* EPHRAIM WHITNEY AND OTHERS.

Where one was assessed for lands lying in a school district, in which it was not legally taxable, but which he had requested the assessors to place to his account of taxable property, and informed them that he was to be taxed for it, it was held that the assessors were not liable to an action of trespass for making such assessment.

THIS action was trespass, brought to recover damages for taking the personal chattels of the plaintiff, to satisfy a tax assessed on him for the use of a school district in the town of *Upton*, in this county, in the year 1804, against the defendants, as assessors.

[* 94] * The action was tried upon the general issue, before *Sedgwick*, J., at an adjournment of the last September term in this county, and a verdict given for the defendants.

At the trial, it was agreed that the defendants, at the time of the assessment of the tax for which the plaintiff's chattels were distrained, were the assessors of *Upton*, duly elected and sworn; — that the assessment was duly made for money legally voted by an established school district in that town for the purpose of erecting a school-house in the same district; — that the plaintiff was an inhabitant of that town, residing in a district other than that for which the tax was granted, and having lands in his own occupation in the district wherein he resided; — that the tax, for which the chattels were taken, was for the lands of the plaintiff only which lay in the district first mentioned; — that the goods mentioned in the plaintiff's declaration were taken by the collector, and sold in the manner prescribed by law; — and that they were the property of the plaintiff.

The lands, for which the said tax was assessed, were not assessed for the use of any other district in the year 1804, nor was the plaintiff assessed in that year for the use of any other school district.

On the part of the defendants, evidence was given to the jury, to prove that the lands, for which the tax was assessed, were, during the year 1804, occupied by *N. Beals*, as the tenant of the plaintiff. This evidence was opposed by testimony given on the part of the plaintiff, that *Beals* occupied the lands merely as the plaintiff's servant, and for his benefit.

It was proved by evidence unimpeached and unquestioned, that at a meeting of the defendants as assessors, for the purpose of making a valuation of the taxable property of *Upton*, at which meeting the plaintiff and *Beals* were present, the plaintiff desired the assessors, in the presence of *Beals*, to place the said land, for which the tax was assessed, and which was in the occupation of

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Beals, to the plaintiff's account of taxable property, informing them that he * was to be taxed for it; with which [* 95] request the assessors complied.

The judge, who sat at the trial, directed the jury, that if they were satisfied that the lands, for which the tax was assessed, were in the actual occupation of *Beals*, as the tenant of the plaintiff, and not in the plaintiff's own occupation, they ought to find their verdict for the defendants; and otherwise for the plaintiff; and they found for the defendants.

The plaintiff moved for a new trial for the misdirection of the judge; and the cause stood over to this term for the consideration of that motion.

Bangs and *Hastings* for the plaintiff.

Bigelow and *Blake* for the defendants.

In support of the motion for a new trial, it was contended that *Beals*, being tenant of the land in question, as was established by the verdict, was alone liable by law to be taxed for it, and the plaintiff's request to the assessors, to act illegally in their office, furnished them no justification. It may be that all the lands in a school district may be in the occupation of tenants; in which case, if the direction in this case was legal and correct, a school-house could never be erected or repaired.

For the defendants it was insisted that the tax was duly and legally assessed upon the plaintiff; — and if otherwise, that his consent and request to the assessors barred him of his action against them.

The action being continued *nisi*, at the following March term in *Suffolk*, *the Court* expressed their opinion that the tax was improperly assessed upon the plaintiff; but that his request to the assessors, that the land might be taxed to him, furnished the defendants with a sufficient answer to an action of trespass against them.

Judgment on the verdict

[* 96]

* THE INHABITANTS OF THE FIRST PARISH IN SUTTON *versus* DAVID COLE AND ANOTHER.

Where, in a town consisting of two parishes divided by lines, the legislature incorporated a number of the inhabitants of both parishes, with their estates, into a separate religious society; it was held that the members of the new society ceased, from the time of their incorporation, to be members of the respective parishes, of which they were before inhabitants.

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Entry *sur disseisin*, in which the demandants count on their own seisin within thirty years, and on a disseisin by the tenants.

The original writ was directed to and served by a coroner, and the reason alleged therefor was that one *Gibbs Sibley* was a member of said parish, and also a deputy of *Thomas W. Ward*, Esquire, sheriff of the county of *Worcester*. At the return term in the Court of Common Pleas, the defendants pleaded in abatement to the writ, that the said *Sibley* was not a member of the said first parish, on which plea issue was joined, and a verdict rendered for the plaintiffs. Judgment being rendered on the verdict, the plaintiffs appealed, and in this Court submitted the cause to the opinion of the Court upon certain facts agreed.

The facts stated were, in substance, that *John Cole*, late of said *Sutton*, deceased, being seised of the demanded premises, on the third day of February, 1807, made his last will, and therein, among other things, devised as follows, viz.: "I give and devise to *the South Parish in Sutton*, to be applied to the use of schools, and to be kept by the inhabitants forever, and the income applied solely for that purpose, all that my messuage and tenement I now live on, together with the buildings situate, lying, and being in the South Parish in *Sutton*," bounded as in said will is described; and afterwards the said testator died, and his said will was duly proved, approved, and allowed.

Previous to the 28th day of October, 1743, the town of *Sutton* constituted one parish; but on that day all the land in said town lying north of a line drawn three miles southwardly from the north line of the town, and parallel thereto, was, by a vote of the legislature of the then province, made a separate parish or precinct, and in the same vote the remaining part of said town is called [* 97] *the first parish* * *in Sutton*, which said parish is commonly known by the name of "*the South Parish in Sutton.*"

On the 25th of June, 1794, the legislature passed an act incorporating certain individuals therein named, inhabitants of said town, together with their estates, (whereof the said *Gibbs Sibley* is one, and living within the limits of the said first parish,) without reference to the part of the town in which they respectively dwelt, into a religious society, by the name of "the first congregational society in *Sutton*." The said act also provides that all the members of the society thereby incorporated shall be exempt from taxation, for the support of public worship, in any other society in said town.

If, upon these facts, the Court should be of opinion that the said *Gibbs Sibley* was an inhabitant of the said first parish in *Sutton*, the tenants agreed to suffer judgment to go against them by default, but if the Court should be of a different opinion, the demandants

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agreed to become nonsuit, and that the tenants should have judgment for their costs.

Blake, for the demandants, contended that the act of 1794, creating the congregational society, did not dissolve or merge the preëxisting first parish or precinct; and that *Sibley*, although by the act made one of the new society, did not thereby cease to be an inhabitant and member of the original parish. A congregational society is distinguishable from a parish or precinct, the former having ecclesiastical rights and powers only; whereas the latter has civil as well as ecclesiastical powers and rights. Thus by the statute of 1789, *c.* 19, § 8, parishes and precincts have authority to raise moneys for the support of school-masters — a power never vested by law in a religious society.

Bigelow and *Lincoln* for the tenants.

By the Court. The question brought before us in this action is whether *Gibbs Sibley* is, upon the facts shown, an inhabitant of the first parish in the town of *Sutton*. And we are decidedly of opinion that he is not. The congregational society, created by the statute of 1794, is to every intent * a parish. The per- [* 98] sons named in the act, together with their estates, are set off from the rest of the inhabitants and territory of the town, and erected into a corporation well known in this commonwealth by the name of a *poll parish*. In the language of the declaration of rights prefixed to the constitution, and of our laws, the terms *parish* and *religious society* have the same meaning and effect. Let the demandants be called.

Demandants nonsuit.

Daniel Stone *versus* Richard Kelly.

In an action on simple contract, the *ad damnum* was more than fifty dollars; at the Common Pleas the plaintiff had judgment for thirty-nine dollars; the defendant appealed, entered his appeal, and afterwards suffered a default. It was held that the appeal lay, and that the plaintiff was entitled to double costs in this Court.

Assumpsit for the labor of the plaintiff's son. The declaration contained two counts, viz., *indebitatus assumpsit* for forty dollars, and a *quantum meruit* for the same services — *ad damnum* eighty dollars.

At the Court of Common Pleas the action was tried on the general issue, and a verdict returned for the plaintiff for thirty-nine

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dollars. From the judgment on that verdict the defendant appealed to this Court, and, after entering his appeal, was defaulted.

Lincoln, of counsel for the defendant, then moved in arrest of judgment, on the ground that no appeal lay in the case, the statute of 1803, *c.* 155, § 5, enacting that no appeal shall thereafter be allowed from the judgment of any Court of Common Pleas, in any action founded on simple contract, wherein it shall appear that the demand of the plaintiff does not exceed fifty dollars. And he contended that it was apparent in this case, that, although the plaintiff had laid his damages at eighty dollars, the real demand was but forty dollars, the two promises alleged in the declaration being evidently for the same cause of action. In the case of *Campbell* vs. *Howard*, (1) the chief justice, in delivering the opinion of the Court adverting to the provision of the statute referred to, says "the appeal is a mere nullity," and points out the remedy which the plaintiff has to obtain the benefit of his judgment below.

[* 99] * *Bangs*, for the plaintiff, relied on the provision contained in the latter part of the section of the statute cited for the defendant, which declares that where, in such a case as the present, the defendant shall appeal, the plaintiff shall be entitled to and recover double costs after the making such appeal; and he moved for judgment accordingly.

Per Curiam. The plaintiff's demand was for more than fifty dollars, and the appeal was not taken away by the statute cited. The plaintiff is entitled to judgment for his damages, and double costs in this Court.

(1) 5 *Mass. Rep.* 376.

HULDAH LEGG *versus* LEVI LEGG.

After a divorce *a vinculo* had been decreed by the Supreme Court of the state of *Vermont*, the wife brought her action here, to recover of the husband the proceeds of certain promissory notes given to her before the marriage, which were received by him after the divorce; and she had judgment: the court refusing parole evidence, that the court of *Vermont*, in settling the wife's alimony, took into consideration the said proceeds as belonging to the husband when they should be received by him.

ASSUMPSIT for five hundred dollars had and received by the defendant to the plaintiff's use.

At the trial, which was had upon the general issue, at the last April

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term in this county, before *Sedgwick*, J., it was agreed that the parties had intermarried; and an authenticated copy of a decree of the Supreme Court of the state of *Vermont* was produced by the plaintiff, annulling the marriage contract between her and the defendant, and granting her a certain sum by way of alimony.

Before the marriage, certain promissory notes were given to the plaintiff, which were not discharged during the coverture. After the dissolution of the marriage, the defendant, having those notes in possession, received thereon of the promisors money to the amount for which the verdict was rendered; the same being taken for the plaintiff, by direction of the judge, who sat at the trial, subject to the opinion of the Court upon the following objections made by the defendant's counsel, which were overruled by the judge.

1. It was objected that the decree of divorce was not sufficient evidence of the dissolution of the marriage of the parties, to prove that the plaintiff was thereby entitled to avail herself, in her own right, of the *choses in action*, *which belonged [* 100] to her before the intermarriage; but that the defendant, that divorce notwithstanding, was authorized by law to receive money on the said notes of hand, and to retain the same to his own use.

2. It was offered to be proved, on the part of the defendant by parole evidence, that the court in the state of *Vermont*, in the decree of alimony, took into consideration the above-mentioned promissory notes as belonging to the defendant; and that the money due thereon would, when collected, be his property. But the judge, believing that parole testimony was incompetent to control the manifest import of the decree, rejected the evidence offered.

The defendant moved for a new trial for the foregoing reasons, which were stated in the judge's report, and the cause stood over upon that motion.

Blake for the defendant. The marriage being admitted, it follows that the wife can maintain no action against the husband, unless a dissolution of that marriage is shown, nor unless it be shown that the decree of such dissolution was authorized by the laws of the state of *Vermont*, and that the authority of the court in that case was exercised with due discretion. The marriage was, *ipso facto*, a gift of all the wife's personal chattels to the husband; and it is necessary for the plaintiff's recovery to satisfy the Court, that an effect of the divorce was to revest in her the property of the promissory notes, the proceeds of which she demands in this action. Although the law of the place where contracts are made may properly be applied to the construction of such contracts, it does not follow, nor is it known that the principle has been carried so far as to apply that law to the dissolution of a contract, especially of

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the marriage contract, so peculiar in its nature, and the annulling of which for slight causes is so contrary to the policy of our own laws.

The plaintiff's right to recover being bottomed wholly on the decree of divorce, it was certainly competent to the defen-
[* 101] dant to prove that in making that decree, and in * awarding to the plaintiff her alimony, the court had reference to the notes as belonging to the defendant in virtue of the dissolution of the marriage. If the fact thus offered to be proved were established, the plaintiff's recovery in this action would be contrary to every principle of law, as well as equity. In the case of *Ganer* vs. *Lady Gainsborough*, (1) parole evidence was admitted by Lord *Kenyon*, to prove the law of a foreign country, as it related to the proceedings in the courts of that country, and this as to the effect of a divorce which was alleged to have taken place there.

Hastings for the plaintiff.

By the Court. We cannot judicially take notice of the laws of *Vermont*. By our own law, marriage is an absolute gift to the husband of all the wife's personal chattels in possession; and so it is also of *choses in action*, if he reduces them into possession by receiving or recovering them at law. But on the dissolution of the marriage, either by the death of the husband, or by a divorce *a vinculo*, *choses in action*, not reduced to possession during the coverture, remain the property of the wife. We must presume the laws of *Vermont* to be similar to ours on this subject, unless the contrary is regularly shown. Parole evidence respecting the grounds of the judgment of the court, in awarding alimony to the plaintiff, was very properly rejected by the judge at the trial: his direction was correct, and the verdict must stand.

Judgment on the verdict.

(1) *Peake's N. P. Reports*, 17.—1 *P. Will.* 431, *S. P.*

STEPHEN P. GARDNER *versus* JOSIAH FLAGG.

Where more than legal interest has been taken on a loan of money, the mortgage or other security for such loan is not therefore void, unless the same was originally reserved thereon; although the party may be liable to an indictment, or an action for the forfeiture given by the statute.

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GARDNER *vs.* FLAGG.

THIS was a writ of entry to foreclose a mortgage, originally made by the tenant to *William Stedman* and *Caleb Moore*, executors of the last will of *James Richardson*, deceased, and by them assigned to the demandant.

[* 102] * The tenant pleaded five several pleas in bar. The *three* first resulted in issues to the country. The *fourth* alleged that the mortgagees had taken and received of the mortgagor more than the rate of six per cent. for the loan and forbearance of the mortgage money for the year 1800, *viz.*, 135 dollars for the loan of 750 dollars. The fifth plea alleged the taking and receiving the sum of 90 dollars for the loan of the same sum for the year 1801. To both these pleas the demandant demurred generally; and the tenant joined in demurrer.

Lincoln in support of the demurrer. The statute (1) does not make the security void, where usurious interest has been received upon it, unless the same was originally reserved by the contract. The receiver may be liable to a penalty under the statute, by indictment or by an action of the case, but the contract is not avoided. Such has been the construction of the English statutes, (2) the language of which is similar to ours, and the same opinion is said to have been held in our own courts, although we have no reports of the cases.

Bigelow for the tenant. The statute is express that all mortgages, &c., whereon there shall be *taken* more than at the rate of six per cent., shall be utterly void. The provision in the second section of the statute for the debtor's swearing is not found in the English statutes; and the effect of the debtor's oath being to avoid the contract absolutely, it should seem that another construction ought to be given to similar words used in the same statute. The expression in the first section, upon which the pleas in the case at bar were formed, is "reserved or taken;" and in the second section the words are "taken, reserved, or secured."

By the Court. The security is not void, although an indictment, or an action of the case, may lie for receiving the usury. Let the demandant have judgment on his demurrer.

(1) 1783, *c.* 55.
(2) 1 *Saund.* 295. — *T. Raym.* 196, *S. C.* — 1 *Mod.* 69. — 1 *Vent.* 38.

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*ARNOLD BUFFUM *versus* ISAAC CHADWICK.

A promissory note was given to *A. B.*, agent of a manufacturing company:— held that an action lay for *A. B.* on the note, and his styling himself agent, &c., in his writ and declaration, was merely *descriptio personæ*.

THE defendant was attached "to answer to *Arnold Buffum*, of *Providence*, in the county of *Providence*, *&c.*, *agent of the Providence Hat-manufacturing Company*, in a plea of the case for that the said *I. C.*, at, &c., on, &c., by his note of hand of that date, for value received of the Providence *Hat-manufacturing Company*, promised the said *A. B.*, as agent thereof, to pay to him or order the sum of, &c., to the damage of the said *A. B.*, in his said capacity," &c

After a verdict for the plaintiff in the Court of Common Pleas, the defendant moved in arrest of judgment, assigning the following reasons, *viz.*

1. Because there is no party named in the writ, to whom by law the said *Chadwick* is bound to answer.

2. Because there is no promise, alleged in the declaration of the writ, to any person or persons, body politic or corporate, legally described therein.

3. Because there is no consideration for any supposed promise alleged in the declaration.

4. Because there is no damage laid to any person or persons, body politic or corporate, for the breach of any supposed promise alleged in the declaration.

5. Because it does not appear, by the writ and declaration, that there is any cause of action against the defendant.

6. Because a judgment in the present action would be no bar to an action to be hereafter brought for the same cause.

7. Because the said writ and declaration are so uncertain, defective, and informal, that no judgment can by law be rendered thereon.

The action being brought up by appeal, it was agreed that if, in the opinion of the Court, judgment could by law be rendered upon any verdict found in this action for the plaintiff, the defendant should be defaulted; otherwise the plaintiff should become nonsuit and judgment in either case be rendered accordingly.

[* 104] *And now, at this term, *Lincoln*, of counsel for the defendant, cited the case of *Gilmore* vs. *Pope*, (1) as showing that, if any action lies on the promise declared on, it must

(1) 5 *Mass. Rep.* 491.

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be brought in the name of the company, whose agent only the plaintiff is, and from whom alone the consideration moved.

By the Court. The cases are different. The contract in the case cited was directly with the corporation. In the case at bar the contract was with the agent personally, and his adding his character to his name in the writ and declaration amounts only to a description of his person. Let the defendant be called.

Defendant defaulted.

Bangs for the plaintiff.

THE INHABITANTS OF WESTMINSTER *versus* THE INHABITANTS OF BERNARDSTON.

A notice to a town to be charged with the support of a pauper, signed by one overseer, by order of the whole, is sufficient within the statute of 1793, c. 59, § 12.

Such notice, not duly objected to, is a bar to a defendant town, as to the question of the pauper's settlement, although it appears that such pauper had no legal settlement in any town within the commonwealth.

THIS action was *assumpsit* for expenses incurred in the support of *Hugh Casey*, a pauper; and it was tried upon the general issue before *Sewall*, J., at the sittings after September term, 1809, in this county.

Upon the trial, the plaintiffs showed in evidence, that the pauper was in their town, sick and in need of relief, and that they had supplied him as alleged in their declaration; that on the 11th July, 1806, the following letter was delivered to the overseers of the poor of the town of *Bernardston*, to whom it was addressed, viz. "*This is to inform you that there is a person now residing in* Westminster, *in the county of* Worcester, *by the name of* Hugh Casey, *who by misfortune broke the bone of his thigh, and is now under the hand of the surgeon, at the expense of this town. We are informed that he has resided some years in* Bernardston, *and we suppose he has a residence there. This is therefore to notify and request you to take such measures for his support or removal, as you in your wisdom may* * *think best.* Westminster, *July* 3, [* 105] 1806. *By order of the selectmen and overseers of the poor.* Abel Wood." — And that said *Abel Wood* was at that time one of the overseers of the poor of said *Westminster*.

The defendants did not show that any answer had been returned to the said letter; but offered to prove that the said pauper had no

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legal settlement within the commonwealth, by his own deposition, which stated that he had been supported by the commonwealth, both before said accident, and since his removal to *Bernardston;* and by the written acknowledgment of the overseers of the poor of *Westminster*, referring to facts which had come to their knowledge since the present controversy.

The judge rejected the evidence so offered by the defendants, on the ground that it was not competent to them to contest, in this action, the question of the settlement of the said pauper.

The defendants excepted to this decision of the judge, and, after a verdict for the plaintiffs, the action stood over upon their motion for a new trial.

This motion was argued at the last September term in this county, by *Upham* and *S. Strong* for the plaintiffs, and *Bigelow* and *Blake* for the defendants.

For the defendants it was urged, that the notification from the plaintiffs was not conformed to the requisitions of the statute, and so ought not to operate as an estoppel to the defendants. It was subscribed by one of the overseers only, whereas the statute requires it to be signed by the overseers generally, so that at least a majority of them is necessary. In the case of *Quincy* vs. *Braintree*, (1) this objection was taken to the notice, and no decision was had on it, as the point went off on the admission of the defendants, in the agreed case, that the notice was given "by the overseers of *Quincy*." There is no affirmation in the notification that the pauper had his *settlement* in *Bernardston*. It is merely alleged that he had *resided* there some years, and that the overseers of *Westminster* supposed he had a *residence* there.

[* 106] * But the point most relied on by the defendants was, that all the provisions of the statute (2) upon this subject contemplate only the case where the pauper has a legal settlement in some town within the commonwealth. From the ninth to the twelfth section, inclusively, the duties and rights of towns, in which paupers may be legally settled, are regulated. The thirteenth section alone makes provision for the support of paupers having no settlement within the commonwealth. If the defendants had been permitted to prove the facts respecting the pauper in this case, the estoppel furnished by the statute, and relied on by the plaintiffs, would have been shown not to arise.

For the plaintiffs it was said that the provision in the twelfth section was absolute and unlimited; that if the notice is not objected to within two months, the town, to whom the notice is given, shall

(1) 5 *Mass. Rep.* 86. (2) 1793, *c.* 59.

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be barred from contesting the question of settlement with the town giving the notice. The construction contended for by the defendants would defeat the salutary intentions of the statute. Towns would never know what course to take when they received no answer to the notice given.

As to the form of the notice, it was within the spirit and intent of the act. It was signed by order of the whole board of selectmen and overseers, and was abundantly sufficient to put the defendants upon their guard, and to lead them to examine the question of their liability, or, at least, by objecting to the removal of the pauper within two months, to prevent themselves from being estopped on the question of settlement. By residence in the notice must be understood *settlement*, or the notice is perfectly nugatory.

The action stood over to this term for advisement; and, now,

The Court were of opinion that the signature of one of the overseers, purporting to be by order of the whole, was a sufficient compliance with the statute. — As to the use of the word *residence* where *settlement* was evidently meant, it might have been deserving of some attention, had it not * been explained [* 107] by the after request that measures might be taken by the overseers of *Bernardston* for the support or removal of the pauper. Thus explained, the notice was sufficient for the purposes intended by the statute. — And this notice, not objected to, is by the statute a bar to the question of settlement, although the pauper may in fact have no legal settlement within the commonwealth. The object of the law was to prevent needless suits. The town, who gives the notice and requests the removal of the pauper, has ground to presume, from the silence of the other party, that they acquiesce in the charge.

Judgment on the verdict.

COMMONWEALTH *versus* TILLEY HOUGHTON.

In an indictment on the statute of 1804, *c.* 120, § 2, for having in possession more than ten counterfeit bank bills, it is necessary to describe the bills in the indictment, or to set forth therein a sufficient reason why they are not so described.

THE defendant was indicted for "that at, &c., on, &c., he had in his custody and possession more than ten, viz., twenty-five, false, forged, and counterfeit bank bills or promissory notes, payable to the

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bearer thereof, purporting to be twenty-five bank bills or promissory notes, signed in behalf of the *Union Bank*, for the sum of five dollars each, the said *Union Bank* being a corporation by law licensed and authorized as a bank within this commonwealth; and that he, the said *Houghton*, having knowledge that the aforesaid bills or notes, and each and every one of them, were false, forged, and counterfeit, did then and there willingly aid and assist in rendering the aforesaid false, forged, and counterfeit bills or notes, and each of them, current as true; and for that purpose did, then and there, and at one time, have and possess each and every one of the aforesaid false, forged, and counterfeit bills or notes, knowing the same to be false, forged, and counterfeit, with intent to utter and pass the same, and thereby to injure and defraud the president, directors, and company of the said *Union Bank*, — against the peace of the said commonwealth, and against the form of the statute in such case made and provided."

[* 108] *The defendant, being tried and convicted before *Sedgwick*, J., at the last April term in this county, moved in arrest of judgment, assigning the following reasons, *viz.*

1. "That the said indictment does not contain any precise or sufficient description of the bills or notes alleged to have been in the possession of the defendant, either according to the tenor or purport of the same; nor is any reason alleged why they are not so described.

2. "That it is no where alleged or averred in said indictment, by whom the said bills or notes were signed, or what were the dates of the same.

3. "That it is averred in said indictment, that the said bills or notes were signed in behalf of the *Union Bank*, the said bank being a corporation by law licensed and authorized as a bank within this commonwealth; whereas, in truth, no such corporation exists within this commonwealth.

4. "That it is alleged in said indictment, that the defendant was possessed of the said bills, with an intent to defraud the president, directors and company of the *Union Bank*; whereas, in truth, there is no body politic or corporate, or any person or persons, known by that name within this commonwealth.

5. "That there is no allegation in the said indictment of the defendant's having knowledge of the false making, &c., of the said bills or notes.

6. "That it is not alleged in the said indictment that the said bills or notes were similar."

The cause stood continued to this term upon the said motion; and, now

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Smith, for the defendant, contended that the indictment ought to set forth the tenor of the bills supposed to be counterfeit, that it may appear that they were issued by a duly-authorized corporation, and that the defendant may be able to plead the conviction in bar of a second indictment for the same offence. (1)

The fourth exception to the indictment is very material. *East* lays it down, that the intent to defraud must be stated *in the indictment, and pointed at the particular person [* 109] or persons against whom it is meditated, and the proof must tally with such averment, otherwise the prisoner will be entitled to an acquittal. The indictment in the case at bar alleges the intent to defraud *the president, directors, and company of the Union Bank*. Now, the real name of that corporation — and a corporation can be known or described only by its name — is, *the president and directors of the Union Bank*. If an intent to injure some person or corporation is not alleged and proved, there is no offence within the statute, on which the indictment is predicated. (2)

The misnomer of the corporation is also relied on in support of the *third* exception to the indictment. If there is no corporation, whose name is forged, there can be no forgery.

Davis, solicitor-general, (being called on by the Court,) observed that he had uniformly drawn indictments for this offence in the manner here used, and objected to by the defendant in his first cause alleged in arrest of the judgment; and that every judge of this Court had severally sentenced convicts thereon at *nisi prius*.

As to the name of the bank, it is sufficient. It is not necessary to describe the corporate name with the same strictness as where corporations are parties to civil actions. Especially are such niceties to be disregarded after conviction. (3) It may be worthy of notice here, that by the statute of 1808, *c.* 99, § 2, all the banks in the commonwealth are thereafter required to use the corporate name of "the president, directors, and company," whatever may have been their original names of incorporation.

The cause was continued for advisement, and at the following April term, the prisoner being brought into Court, and set to the bar, his honor, Judge *Sedgwick*, by whom the Court was holden, addressed him as follows: —

Tilley Houghton,

Your motion in arrest of judgment has been deliberately considered by all the judges, and their unanimous opinion is that it must prevail.

(1) 2 *East's C. L.* 975 (2) 2 *East*, 988.
(3) *Ibid.* 990 *Rex* vs. *Lovell.* — 1 *Leach's C. L.* 282, *S. C.*

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[* 110] * There are many objections made to the indictment in this case, all of which, except, the first, might be got over, as the Court has unanimously determined in the case of the writ of error brought by *Murray Brown* to reverse a judgment against him. (4) Upon these therefore it is not necessary to give an opinion.

The objection is, that the indictment does not give any precise or sufficient description of the bills or notes alleged to have been in the prisoner's possession; nor is any reason alleged why they are not so described.

The description given of the bills is, "that they were false, forged, and counterfeit bank bills or promissory notes, signed in behalf of the *Union Bank*, for the sum of five dollars each," and that they purported to be payable "to the bearers thereof;" but the indictment does not set forth the tenor or substance of the bills, either as to their form, dates, or the person or persons to whom they were payable.

East (5) lays it down as a general rule, that "it is essentially necessary to an indictment for forgery, that the instrument alleged to be forged should be set forth in words and figures; though there be no technical form of words for expressing that it is so set forth." And he cites two cases (one of them determined as long ago as the year 1767) in which it was so decided by all the twelve judges of *England;* and a like determination is reported to have been made in *Lyon's* case. (6)

But there are cases which will form just and necessary exceptions to this rule; as where the forged instrument has been destroyed by the prisoner, or has remained in his possession; and perhaps in other cases, where the instrument cannot be produced, and there are no laches on the part of the government or prosecutor. But in every such instance, that the exception may be admitted, it must appear in the indictment what is the cause of the non-description of the instrument. From the record in this case we do [* 111] not know that the forged bills were not with * the grand jury at the time the indictment was found; nor do we know that they were not produced at the trial.

It would be difficult, if not impossible, to discover any good or satisfactory reason in support of many of the niceties which are established in criminal proceedings, and which may not be relaxed. In the instance under consideration, however, the reason is very obvious. A particular description of the instrument may enable

(4) *Vide ante*, page 59 (5) *C. L.* 975. (6) 2 *Leach*. 696.

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the party charged more effectually to prepare for his defence, and thus may become a shield to innocence.

On the whole, we are satisfied that judgment must be arrested, but as there is great reason from the conviction to hold the prisoner, until it be known whether another bill will not be preferred against him, — if that be not done, when the grand jury shall be discharged, he will be released, unless some sufficient legal cause of detention shall be shown.

JOSEPH GREEN *versus* MOSES GILL, Executor.

Parole evidence may be admitted that an executor has posted up notifications of his appointment, &c., pursuant to *Stat.* 1788, *c.* 66, § 1, without producing one of the original advertisements, or a copy; and such evidence will be good to bar a recovery in an action commenced after four years from the executor's giving bonds.

To an action of *assumpsit*, brought against the defendant, as executor of the last will and testament of *Moses Gill*, Esquire, de ceased, the defendant pleaded in bar, that the action was not commenced within four years after his acceptance of the said trust of executor.

The plaintiff replied that at the time of the probate of the will, and the acceptance by the defendant of the trust of executor, the judge of probate directed him to give public notice of his appoint ment to and acceptance of said trust, by posting up notifications thereof at two or more public places in the town of, &c., and by causing the same to be published in certain public newspapers within three months, and to make due return of an original advertisement, or a true copy thereof, on oath, within seven months from said time; and that the defendant did not make known the same by causing notifications thereof to be posted * up [* 112] in said town, agreeable to said order, or in any other way, nor by publishing the same in the said newspapers, or in any other manner; nor did he ever make any return, &c., agreeable to said direction.

The defendant, in his rejoinder, averred the giving the several notices directed within three months after, &c., and tendered an issue to the country, which was joined by the plaintiff.

Upon the trial of this issue before *the Chief Justice*, at the sittings here after this term, the defendant undertook to prove, by parole testimony, that he did duly post up, in the town of *Princeton*,

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(the place where the testator had his habitancy at the time of his death,) advertisements in due form of law, notifying his appointment to and acceptance of the trust of executor of the last will and testament of the said deceased. The plaintiff objected to the admission of such parole evidence, without producing to the jury one of the original advertisements, or a copy thereof. The chief justice overruled the exception, and admitted the evidence, and directed the jury that the evidence was legal and proper to authorize them to find the issue on trial in favor of the said executor, without the production of such original advertisement, or an original copy thereof.

A verdict being accordingly rendered for the defendant, the action stood continued *nisi* for the consideration of the said objection; and at the following March term in *Suffolk*, the opinion of *the Court* was delivered to the following effect.

By the statute of 1788, *c.* 66, § 1, it is provided that every executor or administrator, undertaking the trust, shall cause notifications thereof to be posted up, within three months, in the town where the deceased was resident and had his habitancy at the time of his death; and shall give such further notice as the Court of Probate shall direct: "an affidavit of the executor or administrator, made and filed in the same Probate Court, within seven months after undertaking that trust, accompanied with [* 113] an original notification, * (or a copy thereof,) recorded in the probate office, shall be admitted as evidence of the time, place, and manner notice was given. By § 3, of the same act, no executor or administrator shall be held to answer to the suit of any creditor of his testator or intestate, unless the same shall have been originally commenced within three years (extended to four years by statute of 1791, *c.* 28) from his giving bond for the faithful discharge of his trust; with certain exceptions, not bearing on the case at bar, provided such executor or administrator shall have given the public notice required by the act.

In the case before us, the defendant proved that he had posted the notifications prescribed by the statute, but it did not appear that he had made and filed an affidavit of such posting in the probate office. This particular provision of the statute was introduced for the convenience of the executor or administrator. Other evidence of the fact may properly be received, and, if satisfactory to the jury, is of the same avail.

Judgment on the verdict.

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EBENEZER HERRING AND ANOTHER *versus* ELNATHAN POLLEY.

By the practice of the courts in this state, judgment is presumed to be entered on the last day of the term; unless on motion it be in fact entered previously, in which case the time is minuted; and the thirty days, during which goods and estate attached on mesne process are held, are to be reckoned accordingly,

A creditor's choosing an appraiser, and receiving seisin of lands upon execution, are sufficient evidence of his election to extend his execution upon real estate, although the sheriff does not certify such election.

A judgment creditor may extend his execution upon real estate, although there may be sufficient personal estate to satisfy his execution, and notwithstanding he may have attached such personal estate on his original writ in the same suit.

If one of two judgment debtors elect an appraiser to appraise land belonging to them both, or to him only, it is sufficient; otherwise if the land belong solely to the other debtor.

ENTRY *sur disseisin*, in which the demandants count upon their own seisin of a messuage and eighteen acres of land in *Harvard*, in this county, within thirty years, and upon a disseisin by the defendant.

Upon *nul disseisin* pleaded and joined, a trial was had at the last April term in this county, before *Sedgwick*, J., who reports, that at the trial the demandants stated their [* 114] title to depend upon a judgment of the Court of Common Pleas for the county of *Worcester*, rendered at December term, 1807, for 1440 dollars 54 cents damage, and 13 dollars 83 cents costs, upon which an execution issued on the fifth of January, 1808, and a return of a levy made upon the demanded premises on the eighth of the same January; and a copy of their original writ, showing an attachment, and on the eighth of July, 1807, of several tracts of land, besides including the demanded premises, together with a large amount in value of personal property.

To the admission of this evidence the tenant objected; — That the execution was not levied within thirty days after final judgment; — And that it did not appear from the officer's return upon the execution, 1st. That the demandants elected to extend their execution upon the debtor's real estate, or directed the same to be done; — 2d. That the premises were not shown to the officer and appraisers, or either of them, by the creditors, or any attorney duly authorized to show the same, or to receive seisin and possession of the same; — 3d. That it did not appear to which of the judgment debtors the estate extended upon belonged, so that it could not be

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known whether the actual owner of the land chose an appraiser; — 4th. That it did not appear that the officers set forth the premises by metes and bounds; —5th. That he did not deliver seisin to either of the creditors, or to any person by them authorized to receive the same; — 6th. That it did not appear that the premises were levied upon for want of personal estate, to the acceptance of the creditors.

The record of the judgment produced by the demandants was of a court holden on the Monday next preceding the first Tuesday of December, being the thirtieth day of November, 1807; and by the minute-book of the Court of Common Pleas for that term, there was an appearance of an attorney for the defendants, and a default entered on the third day of the term; and the [*115] plaintiffs had three days' attendance *allowed them in their bill of costs. At the end of the minutes of the term was this entry, — "The Court adjourned without day, on the 10th day of December, A. D. 1807. *Joseph Allen*, Clerk."

Upon inspecting the return on the execution, the judge ruled that the same could not go in evidence, and directed a nonsuit to be entered, subject to the opinion of the whole Court, upon the attachment, judgment, and return upon the execution, all which were made part of the case.

[The judgment referred to in the judge's report was recovered by the present demandants against *William Stearns* and *Solomon Stearns*. — The officer's return upon the execution issued thereon is as follows: — "*Worcester*, *ss.* January 8th, 1808. I caused three disinterested and discreet men, being freeholders in said county, to be appointed, and chosen, and sworn, as the law directs, viz., *A. B.*, chosen by creditor's attorney, *Thomas Heald*, Esq.; *C. D.*, chosen by *William Stearns*, one of the debtors; and *E. F.*, appointed by me for the third, — to appraise real estate shown to them to satisfy this execution; and they appraised the *above described premises* at the sum of, &c., to satisfy this execution and all fees; and after deducting fees and costs of levying, recording, &c., viz., the sum of, &c., there will remain the sum of, &c., to satisfy this execution in full. — Also I have given seisin and possession to the creditor's attorney, viz., *Thomas Heald*, Esq., by delivering the same described premises to him, the said attorney. I do therefore return this precept fully satisfied."]

The cause was argued at this term upon the judge's report by *Bigelow* for the demandants, and by *J. Prescott* and *Dana* for the tenant.

Bigelow moved for a new trial, alleging that the evidence offered

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by the demandants, and rejected by the judge, was sufficient to maintain their action. There was a regular attachment of the demanded premises at the suit of the demandants, a judgment duly rendered for them in that suit, *and an [* 116] extent of an execution issued thereon. — The principal question is on the time of the extent, whether it was within thirty days from the date of the judgment, so that the previous attachment shall have holden the premises, and the claim of the tenant under a conveyance from the judgment debtor, made after the attachment and before the extent, be thereby barred. On this question the demandants contend that the thirty days are to be reckoned from the rising of the court at the close of the term. Until that time a defendant, who has been defaulted, has a right by statute, [1784, *c.* 28, § 7,] on payment of costs, to have the same day in court as if his default had not been recorded. Whenever, upon motion to the court, judgment is made up on a previous day, and execution is awarded, a minute of the fact is always made; and in such case the thirty days will commence from the day of entering up judgment. But nothing of this kind appears in the case referred to.

To the objection, that it does not appear that the judgment creditors elected to extend their execution on the lands of their debtors, it is answered that their receiving seisin by their attorney is sufficient evidence of their election; and this fact furnishes an answer also to the second objection, that it is not certified that the premises were shown to the officer or appraisers. — It is agreed that it does not appear to which of the judgment debtors the premises belonged; and the natural presumption is, that they were held in common by the two. The fourth objection is, that the premises were not set off by metes and bounds. To this it is answered, that in the certificate of the appraisers, which precedes the officer's return, the boundaries of the premises are described with great minuteness and accuracy, and the officer adopts the description, and makes it part of his return. — As to the fifth objection, Mr. *Heald*, to whom seisin was delivered, was the attorney of record to the creditors in the action, which is sufficient; but if a special authority for the purpose were necessary, it must *be presumed that he had it, since the sheriff recognized [* 117] him as sufficiently authorized, and such special power, if produced at the levy, would not appear in the sheriff's return of the execution. — The sixth objection is abundantly answered by the fact stated in it. Had there been personal estate wherewith the execution might have been satisfied, the creditors would certainly not entangle themselves with real estate subject to redemption for

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twelve months, with so much uncertainty of ever realizing their debt, when they could in a few days have realized the cash for the amount of their execution.

Prescott and *Dana*. Judgments relate to the first day of the term, unless from something on the record it appears that they cannot have that relation. (1) Now, there is nothing in the record in this case, that can carry the judgment farther forward in the term than the third day of it, when the default took place; and the execution was not extended until more than thirty days after that third day. — It does not sufficiently appear from the return of the officer, that the judgment debtors, whose land was taken, had an opportunity to elect an appraiser. Certainly one of them only had such opportunity; and there is nothing in the return which shows that he was the owner of the land, upon which the levy was made. Nor upon a new trial could this objection be cured by parole evidence. — The title of the judgment creditor being derived wholly from the return of the sheriff, that return ought to contain a perfect description of the premises; and to reply upon a reference to the doings of the appraisers for such description would be too loose a practice to rest the title to real estate upon. — There was no evidence of Mr. *Heald's* being the attorney of the creditors, authorized to receive seisin of the lands, except what arose from his commencing and managing their action in court, which we think implies no authority for such a purpose. Such authority ought to be under seal, and to be recorded, with the other proceedings, in [* 118] order to make a complete title to the creditors. *The forms prescribed by the statute ought to be rigidly adhered to, or titles to real estate will become very uncertain. — The statute of 1783, *c.* 57, § 2, authorizes the extending of an execution upon real estate only in cases where the creditor can find no personal estate to satisfy the execution; but here was a large amount of personal property secured by attachment, and which must have been in the hands of the officer at the time of the extent. It is difficult to account for this conduct of the creditors on any principles consistent with fairness, and not strongly implying a desire to oppress and entangle an unfortunate debtor.

The action standing continued *nisi* for advisement, the opinion of the Court was delivered at the following March term, in *Suffolk*, to the following effect, by

PARSONS, C. J. This action is *entry sur disseisin*, in which are demanded a messuage and eighteen acres of land in *Harvard*

(1) 3 *Burr.* 1596, *Swann* vs. *Broome.* — *Tidd's Practice*, 855 — 4 *Co* 7.

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The demandants have counted upon their own seisin, and on a disseisin by the tenant, who pleaded the general issue *nul disseisin*; and on the trial of the issue, the judge rejected an execution of a judgment recovered by the demandants against *William Stearns* and *Solomon Stearns*, which was offered in evidence to prove the demandant's seisin, and ordered a nonsuit to be entered, subject to the opinion of the whole Court, without stating on what ground the evidence was rejected; but referring to the original attachment, the judgment, and the return of the execution, as a part of his report.

The tenant has urged a variety of objections to taking off the nonsuit. — The first objection is, that although the lands, on which the execution was levied, were attached upon the original writ, yet the levy was not made within thirty days after judgment; and it is therefore void as to any *bonâ fide* conveyance, made by the debtor after the attachment and before the levy.

The judgment was rendered at a Court of Common Pleas *holden on the thirtieth day of November, 1807, [* 119] and which adjourned without day on the tenth of December following. The defendant appeared by attorney, but was defaulted on the second day of December; and the levy was made on the eighth day of January, 1808. If the judgment be considered as entered on the first day of the term, or on the day when the defendant made default, the thirty days had expired before the levy; otherwise if the judgment be taken as entered on the last day of the term. — A judgment may be entered on motion during the term, in which case the time of entering it is minuted; but when no day is minuted when judgment is entered, by the ancient usage of this Court, and also of the Common Pleas, judgment is entered on the last day of the term, against the presumption of the common law. Formerly, on the last day of each term, an order was passed to enter judgment, where the party was entitled to judgment, and to continue all actions undetermined. But of late years this order has become a standing rule and practice of the Court.

As the levy was withir thirty days of the last day of the term, this objection cannot prevail, although a conveyance after the attachment, and before the levy, had been made. But as no such conveyance appears from the judge's report, the levy ought to have been admitted in evidence, as being good against the debtors, and those holding under them by a conveyance after the levy, in the same manner as if no previous attachment had been made.

The second objection is, that it does not appear from the levy, that the creditors elected to extend their execution on the lands of

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the debtors. — This objection is not founded on fact; the creditors' attorney having chosen one of the appraisers, and having received seisin from the sheriff. — Under this objection it was also said, that it does not appear that the lands levied on were shown to the officer or appraisers, or seisin received by any person duly authorized by the creditors. — But the sheriff certifies that Mr. *Heald* acted as their attorney; and the claim of the creditors [* 120] *to the land by virtue of the levy is a ratification of his acts as their attorney, if there had been no precedent authority given. Also the sheriff returns expressly, that he was their attorney; and there is no attempt to falsify the return.

Another objection is, that it does not appear that the lands were taken for want of personal estate of the debtors; and this objection is fortified by the return on the original writ of the attachment of personal estate of considerable value. — But, although there may have been sufficient personal property attached, which might have been seised on the execution; yet the creditor may unquestionably elect to waive his attachment, and to levy on the lands of the debtor. He may doubt the debtor's title to his goods, and may not incline to indemnify the officer, or to expose himself to a subsequent lawsuit. And the debtor ought not to complain of his own neglect to pay his just debt. Besides, the extent upon his lands will, *ipso facto*, discharge the attachment of his goods, so that he may at his own convenience raise the money by the sale of them, pay his debt, and take back his land. — This objection therefore is disallowed.

Another objection is, that the sheriff did not deliver seisin of the lands extended upon by metes and bounds. — This objection is not founded on fact. The land is described by courses and distances, the angular points being each distinguished by a stake and stones, or by reference to other boundaries.

The last objection made is, that it does not appear from the return, which of the debtors owned the land levied on. — As to a stranger, as the tenant in the present action appears to be, it is immaterial which of the debtors, or whether both of them, were seised of the land. An appraiser was appointed by *William Stearns*, one of the debtors. If both the debtors were seised of the land, an appointment of an appraiser by one of them was sufficient. If the debtors agreed in their appointment, then this appraiser [* 121] was *appointed by both; if they disagreed, then the sheriff must have appointed; and he might appoint a man chosen by either of the debtors. If *William* was the sole owner, then the choice of an appraiser was right, and *Solomon*, the other debtor, had no right to interfere. If the tenant in this action, on a

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trial of the issue, should not prove to be a stranger, but should derive his title from *Solomon*, as having been sole seised, he will not be bound by the levy; and the seisin acquired by the demandants will be wrongful, and they cannot recover against him. But if his title be derived from *William* and *Solomon*, as seised together, or from *William* alone, he will be bound by the levy, and must fail, unless his title accrued before the attachment.

It is the opinion of the Court, that the nonsuit be set aside, and a new trial be granted.

16

CASE

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF BARNSTABLE, OCTOBER TERM, 1811, AT BARNSTABLE.

PRESENT:

HON. THEODORE SEDGWICK,
HON. SAMUEL SEWALL,
HON. ISAAC PARKER,
} JUSTICES.

SETH F. NYE *versus* WILLIAM OTIS.

A general count in an action for defamation, as *charging the plaintiff with stealing*, is good.

Where one said *he would venture any thing the plaintiff had stolen the book*, the words, being proved to be spoken maliciously, were held to support a verdict for damages.

CASE for slanderous words, falsely and maliciously spoken of the plaintiff by the defendant on the first day of October, 1809, and at divers other days and times. The words charged in the declaration were, "*He has stolen my powder-horn*," "*He has stolen my arithmetic*," and "*He has been unfaithful, and has, I believe, taken money from my desk.*" There was also a count *for charging the plaintiff with the crime of stealing.*

Trial was had at the sittings after the last October term in this

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county, upon the general issue pleaded, before *Sewall*, J., when a general verdict was rendered for the plaintiff for eighty dollars damage.

The deposition of one *Crocker*, admitted at the trial, was objected to by the defendant's counsel, as irrelevant and incompetent to prove either of the sets of words, as alleged in either count of the plaintiff's declaration. The objection more particularly made was for a supposed variance from the second set of words, as alleged in the declaration, * and as stated in the deposition; *Crocker* testifying that, at a time when inquiry was making for the defendant's book of arithmetic, he said, "*he would venture any thing* Nye *had stolen the book.*" — The rest of the evidence at the trial, although sufficient to prove evil speaking and malicious insinuations at other times, did not comport with either of the sets of words, as alleged. — One *Fish*, who was sworn as a witness for the plaintiff, testified that, 15 or 16 months before, he was present in the defendant's office, when he, the defendant, wanted his book of arithmetic, and *Crocker*, the other witness, endeavored to find it, but could not; upon which the defendant said, "*he would venture upon it, that* Nye *had carried it away;*" but the witness did not hear the defendant say that *Nye* had *stolen* the book. — The whole evidence was left to the jury, with a direction to find a verdict for the plaintiff, if they believed that the defendant had maliciously charged the plaintiff with the crime of stealing. [* 123]

The defendant moved for a new trial, for the misdirection of the judge; and, the action being continued *nisi* from this term, the motion was argued the following week at *Plymouth*.

The solicitor-general, in support of the motion, contended, that though the words laid in the first count, with the innuendoes, were sufficient to support an action, yet the words proved were different as well in the manner as the sense. The words charged are direct and positive; while those proved import nothing more than a guess, a suspicion, or at most a presumption; not importing malice in the speaker, which ought to be necessarily implied in the words or in the manner of speaking them. The *sense* as well as the manner of speaking are yet to be strictly in proof, notwithstanding the liberality in modern times applied to actions for words spoken. (1)

There are three sets of words in the first count, part of which are capable of an innocent construction; and of those that might be thought otherwise, there was no evidence at the trial as to part, yet a general verdict was given for the whole. * [* 124]

(1) *Esp Dig.* 521

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The second count is clearly insufficient to support a judgment; yet the verdict, by the direction of the judge, was rendered on this count also.

Thomas and *Sproat* for the plaintiff. All the modern authorities are, that if the words proved agree substantially with those laid, it is sufficient. In the case of *Webb* vs. *Poor*, (2) "*I make no doubt to prove*," &c., was held to be tantamount to a direct charge of the crime, and to be actionable. The words proved in the present case are equally direct and strong.

The second count, which was added *ex majori cautelâ*, lest the evidence should not precisely comport with the words as laid in the first count, though in fact they did, is supported by many modern precedents, and the mode of declaring is sanctioned by Lord *Hardwick*. (3)

The action stood further continued *nisi*; and afterwards, at *Taunton*, the opinion of the Court was pronounced as follows, by

PARKER, J. In the declaration there are two counts — one charging the defendant with having spoken certain defamatory words, specially set forth; the other charging him generally with having maliciously accused the plaintiff of the crime of stealing.

It is doubtful whether some of the words charged in the first count are actionable, *viz.*, "He has been unfaithful, and, I believe, has taken money from my desk." Others are, without doubt, actionable, as, "He has stolen my powder-horn," "He has stolen my arithmetic." The latter, at least, are actionable, with the *innuendo* to explain them, which is found in the declaration.

The evidence, upon which the jury founded their verdict, applied to the second set of words charged in the first count; and there was no evidence to support either of the other charges in that count. The words, as proved, were, "he would venture any thing *Nye* had stolen the book." Another witness, pres-
[* 125] ent at the same conversation, testified *to different words, *viz.*, that the defendant said, "he would venture *Nye* had carried away his book." These words would not be actionable without some *colloquium*, showing that by *carrying away* was clearly intended *stealing*. But it must be presumed that the jury believed the first witness; and they had good reason, as his testimony was given recently after the conversation, and that of the latter more than a year subsequent to it.

General damages were assessed by the jury; and a new trial is moved for, because the words proved were different from the words laid in the count; and according to the rule, that where the words

(2) *Cro. Eliz.* 569. (3) *Cases Temp. Hard.* 305, *Nelson* vs. *Dixie*

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are particularly set forth, they must be proved as laid, this evidence was not sufficient to support the declaration, and a new trial ought to be granted.

But it is contended, that, the words proved being actionable, and the second count having alleged in substance that the defendant charged the plaintiff with the crime of stealing, a new trial ought not to be granted, but judgment entered, because both the counts are good, and the evidence sufficiently maintains the second. This position is true, provided the second count be sufficient, in law, of itself to support an action of slander.

There seems to be no reason why such a count should not be good, if a plaintiff chooses to rely on such a general statement of his case. It certainly is not prejudicial to the defendant; for if he should attempt to justify, instead of being held to prove that the plaintiff has committed the particular theft, with which he may by the words have charged him, he will sufficiently establish his defence by pleading and proving any larceny, committed at any time by the plaintiff.

And the practice seems to have been conformable to this principle; for the books furnish many precedents of declarations in slander of a general nature, or where the substance of the words, and not the words themselves, is laid in the count.

In a very good book of practice, called *Morgan's Vade Mecum*, it is said to be customary, where there is the least
* doubt as to proving the identical words, to add a gen- [* 126]
eral count, as that the defendant charged the plaintiff
with the crime of, &c. (*a*) Now, if such count were bad, no judgment could have been rendered on any counts joined with it, where the damages were general. It must therefore be presumed that such a form would long since have been rejected from the precedents, if any legal objections lay to it.

In the action of *Nelson* vs. *Dixie*, which was cited at the bar, Lord *Hardwick* said, in an action for words, you may either lay the particular words spoken, or may set out the substance of them; and if the substance, — as that the defendant charged the plaintiff with such or such a crime, — it is sufficient to prove the substance of the words; and he says there are precedents of the sort in *Rastell's* entries, and the substance is laid in Latin; but where the very words are laid, they must be proved as laid. We think this, though a case at *nisi prius* only; yet, as it was decided by a very eminent

(*a*) [In *Jackson* vs. *Stetson*, (15 *Mass. Rep.* 52,) it is said of *Morgan*, that "a proposition, in any degree questionable in its nature, ought, certainly, to be supported by some more respectable authority." *Morgan* quotes *Nelson* vs. *Dixie*, as his authority which contains a *dictum* at *nisi prius* of no weight. — ED.]

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judge, and seems to be acquiesced in, and is introduced into *Comyn's* Digest and other respectable compendiums, to be sufficient authority for us to support the second count, especially as there can be no inconvenience in this general form of declaring. (*b*)

It is further objected that the words, as proved, did not amount to a direct and positive charge of crime, and therefore would not support any count; the words being *I will venture he has stolen*, &c.

There are many cases where words spoken hypothetically are held to be actionable; and if they were not, it would be easy for the defamer, by cunningly adopting this form of expression, to ruin reputations with impunity. This must be always a subject for the consideration of the jury; if they believe the words to have been maliciously spoken, and with intent to convey a charge of crime, they are bound to give damages, however artful the contrivance may have been to spread scandal, without exposing the author to punishment. Judgment must be entered on the verdict.

(*b*) [According to the best authorities, this general form of pleading is bad. In *Cook* vs. *Cox*, (3 *M. & S.* 116,) Lord *Ellenborough* said, "The words supposed to be used by Lord *Hardwicke*, in *Nelson* vs. *Dixie*, (*Cas. Temp. Hardw.* 305,) were merely thrown out at *nisi prius*, and not material to the point ruled by him in that cause; and they are evidently founded on a mistake, as there are no such precedents in *Rastell* as he supposed;" and it is now well settled, that the libel, or slander, must be set forth *in hæc verba*. Lord *Ellenborough* said, in the case before referred to, "Unless the very words are set out, by which the charge is conveyed, it is almost entirely impossible to plead a recovery in one action, in bar of a subsequent action, for the same cause. Identity may be predicated with certainty of words, but not of the effect of them, as produced upon the mind of a hearer." And in *Gustole* vs. *Mathers*, (1 *M. & W.* 495,) Lord *Abinger* said, "If it were sufficient to state merely the effect of the words, any person would be at liberty to swear as to the effect of the words, without stating any precise words; and even if the witness did state precise words, the jury would have to judge of their legal effect; whereas that is generally to be decided by the court. It is not expedient to blend questions of law and fact together; it ought, therefore, to appear on the face of the declaration, by the words or signs themselves, that they were sufficient to support such innuendoes or averments, as may be necessary to apply to the subject, that they may bear the interpretation put upon them, and present the injury which is charged to have resulted from them." And see *Wrights* vs. *Clements*, 3 *B. & A.* 503. — *Wood* vs. *Brown*, 6 *Taunt.* 169. — *Flint* vs. *Pike*, 4 *B. & Cr.* 473. — *Newton* vs. *Stubbs*, 3 *Mad.* 71. — *Rex* vs. *Bear*, 3 *Salk.* 417. — *Stark*, *Sland.* 362—368. — Sed vide *Pond* vs. *Hartwell*, 17 *Pick.* 269. — *Allen* vs. *Perkins*, 17 *Pick.* 369. — *Whiting* vs. *Smith*, 13 *Pick.* 364. — ED.]

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PLYMOUTH, OCTOBER TERM, 1811, AT PLYMOUTH.

PRESENT:

Hon. THEODORE SEDGWICK,
Hon. SAMUEL SEWALL,
Hon. ISAAC PARKER,
} Justices.

Sylvanus Maxim *versus* Elisha Morse.

In debt on judgment, the defendant pleads his discharge under a commission of bankruptcy: the plaintiff replies that the defendant afterwards waived that advantage, and promised to pay the amount of the judgment. Issue was taken on the promise, which being found for the plaintiff, he had judgment for his debt.

Debt upon a judgment of the Court of Common Pleas for this county, rendered at August term, 1803, for 53 dollars damage and 9 dollars 75 cents costs.

The defendant pleads in bar, that on the 11th of August, 1803, he became a bankrupt; that on the 8th of October following the commissioners certified his conformity; that after the recovery of the recited judgment, and before the purchase of the plaintiff's writ in the present action, *viz.*, on the 3d of November, 1803, the commissioners, with the assent of his creditors, gave him a certifi-

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cate of discharge, which was approved, allowed, and confirmed by the district judge on the 8th of December following; and that the plaintiff's debt might have been proved under the said commission.

The plaintiff replies, that after the defendant had obtained his said certificate, *viz.*, on the 20th of September, 1805, he waived and gave up all advantage to be taken by him, or which [* 128] otherwise he might have taken, of said certificate, * in defeating or barring the demand of the plaintiff against him on the said judgment, by promising the plaintiff that he would pay the amount of the said judgment, and that he did promise the plaintiff to pay him the same.

The defendant rejoins, that he did not make the promise, &c., and tenders an issue to the country, which is joined by the plaintiff.

The jury return a verdict, that the defendant did promise, as alleged in the plaintiff's replication, and find the amount of the debt to be ninety dollars.

The defendant moved in arrest of judgment, on the ground that the plaintiff had misconceived his action, and that it ought to have been in case upon the defendant's promise, instead of debt upon the judgment.

In support of the motion, it was urged that the debt was discharged and extinguished by the bankruptcy and the proceedings under the commission; although, perhaps, it might furnish a sufficient consideration for the new promise. The replication is inconsistent with, and a departure from, the declaration. And the verdict, that the defendant promised, is an absurd and insufficient finding in an action of debt on judgment.

For the plaintiff, it was contended that the subsequent promise was a revival of the old debt; and no good reason could be given why, if the cause of action was revived, the form of the action should not be revived also. If the action had been debt on the simple contract, the evidence necessary to support it would have been the same as if it had been *assumpsit* on the promise. The bankruptcy merely suspends, but does not extinguish, the debt; the new promise destroys the bar set up by the defendant; and the verdict establishes a fact which revives the old debt. Substantial justice has been done, and there is no sufficient reason why, for any objection merely technical, and having no relation to the merits, if indeed it has any weight in it, the plaintiff should be [* 129] turned over to another * action, in which the verdict and judgment must be the same as in the present action. (1)

(1) *Chitty on Pleading*, 40. — 1 *Lawes on Pleading*, 526, *Amer. ed.* — 1 *Selwyn*, 15, 219. — *Peake's N. P. Cases*, 68. — *Cowp.* 544, *Trueman* vs. *Fenton*. — 2 *H. Bl.* 116, *Besford* vs. *Saunders*. — 3 *Bos. & Pul.* 250, *Wennall* vs. *Adney*, *in notis*.

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For the defendant, in reply. None of the cases cited for the plaintiff apply to the objection. It is not denied that the plaintiff is entitled to an action upon the promise, grounded on the original consideration of the judgment. In such an action, the defendant would have been let in to question that consideration, which he is wholly debarred from in the present action.

By the Court. The inconsistency objected in this case is in ap pearance more than in reality. A good collateral fact was put in issue, on which a regular judgment may be entered in the action. The pleadings are very similar to those which frequently arise under the statutes of limitation. The defendant pleads what is, *primâ facie*, a legal bar to the plaintiff's demand; the plaintiff replies other matter, which shows the defendant bound, as well by law as in conscience, to pay the debt; and this matter is found for the plaintiff. There remains no reason why he should not have his judgment on the verdict. The only object of the defendant is to obtain a bill of costs, and to turn the plaintiff over to another action. The case at bar is within those cited for the plaintiff; and one of them is precisely this case.

Judgment on the verdict

Holmes and *Baylies* for the plaintiff.
B. Whitman and *Mitchel* for the defendant.

NATHAN DARLING, Appellant from a Decree of the Judge of Probate, *versus* THOMAS BENNET.

An inquisition by the selectmen that one is *non compos*, and an appointment of a guardian for that cause, are not justified by evidence that the person is old, and has become less careful of his property.

THE decree of the Probate Court appealed from in this case had appointed the respondent, *Bennet*, guardian of the person and estate of the appellant, as a person *non compos* mentis.* [* 130] This decree was founded upon an inquisition made by the selectmen of the town of *Middleborough*, of which the appellant is an inhabitant, by virtue of a warrant issued by the judge of probate, pursuant to the provisions of the statute of 1783, *c.* 38, § 3.

Upon examination of witnesses, it appeared that the appellant was seventy-eight years of age; that, for a man of his years, he

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possessed good rational powers; that his children were profligate and intemperate; that the father, for some time past, had been under their influence, and had been induced to spend his property for their undue indulgence; and that, until within a few years, he had been uncommonly careful of his property; and the alteration of his habit in this respect seemed to have been the ground of the opinion which the selectmen had formed in the case, and to have been also the foundation of the decree complained of.

By the Court. The judge of probate was sufficiently authorized, by the inquisition of the selectmen, to make the decree which he did. But upon the facts now before us there is certainly no sufficient foundation to place the appellant under guardianship as a person *non compos mentis*. Perhaps it would be proper to place guardians over the children, who are causing their father to waste his estate in gratifying their vicious propensities. Further, if the appellant cannot be otherwise protected from the undue practices and impositions of his children upon him, it may yet be discreet and proper for the judge of probate, upon due representation from the selectmen, to place him under guardianship as a spendthrift, that the family may be preserved from want, and the town saved from the expense of their support.

Decree reversed

Eddy for the appellant.
Wood for the respondent.

[* 131]

* HOSEA BREWSTER, Appellant from a Decree of the Judge of Probate, *versus* WESTLING BREWSTER.

An administrator may not charge, in his administration account, the expenses of the support and education of the infant child and heir of his intestate.

THE respondent, being administrator of the estate of *Rebecca Brewster*, (mother of the appellant, he being her only child and heir,) had rendered to the judge of probate his account of administration, in which, among other things, he had made sundry charges against the estate of the deceased for the expenses of boarding, clothing, and schooling the appellant since the decease of his mother. The judge of probate had allowed those charges, and passed the administration account.

Upon this objection, apparent upon inspection of the account.

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the decree was reversed, and the record remitted to the judge of probate, for his further conduct in the premises, agreeably to law.

LOIS WASHBURN *versus* CORNELIUS WASHBURN.

Where a libel for a divorce *a vinculo* for adultery charged the crime as committed without the commonwealth, there being an appearance for the respondent, evidence was received of the fact committed at a place within the common wealth.

THE libel in this case, which was for a divorce *a vinculo* for adultery, alleged that the respondent had deserted the libellant, had left the commonwealth, and, during his absence, had committed the crime of adultery with a woman unknown to the libellant.

Mitchel, in support of the libel, offered evidence of adultery committed in *Greenwich*, in the county of *Hampshire*, and within the commonwealth.

B. Whitman, for the respondent, objected to the admission of such evidence, as not comporting with the allegation in the libel.

By the Court. The specific charges in a libel for a divorce for the cause of adultery are required to be made, if the fact be within the libellant's knowledge, in order that the accused party may not be surprised, and may be advertised of the subject of his defence. Perhaps it would be better in *all [*132] cases to hold the libellant strictly to those charges. But such has not heretofore been the practice of the Court; and where, as in this case, there is an appearance for the respondent, such strictness may be less necessary. The evidence is admitted.

Divorce decreed

WILLIAM SEVER, Appellant from a Decree of the Judge of Probate, *versus* NANCY SEVER, Guardian, &c.

By an appeal from a decree of the Court of Probate, accepting the return of commissioners for the division of an estate, the return is open to every objection that could lawfully have been made to its acceptance in the court below.

UPON the application of the devisees named in the last will of the late Hon. *William Sever*, deceased, commissioners had been ap

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pointed, by warrant from the Probate Court, to divide the real estate of the said deceased among the said devisees, pursuant to the provisions of the statute of 1783, *c.* 36, § 12. The commissioners reported a division, which was accepted by the judge of probate. From that acceptance, the appellant entered his appeal.

Baylies, of counsel for the appellant, stated that he was instructed by his client to say that the objections to the division made by the commissioners went only to their supposed mistakes in estimating the relative or comparative value of the parts of the estate set to the several devisees respectively, by which the appellant believed himself to be in effect a considerable sufferer; but that no suggestion could be made against the integrity, impartiality, or purity of intention, of the commissioners.

The solicitor-general, on the part of the respondent, objected to going into any inquiry respecting the discretion of the commissioners, when no suggestion is offered of corruption, partiality, mistake of the law, or informality in their return.

But the Court observed that, by the interposition of the appeal, the return of the commissioners was opened to every ob-
[* 133] jection that could lawfully have been made to it in * the court below. The partition made by them is, by the statute, made subject to alteration, as well as reversal or confirmation, in this Court.

Two of the commissioners, present in Court, were examined upon their oath, as to the method by which they estimated the value of the several parcels of the estate, and as to their present opinion of that value. Other witnesses were also examined as to the comparative value of the several parcels assigned by the commissioners to the respective devisees. Upon a full hearing of the evidence, the decree of the judge of probate was affirmed.

THOMPSON BAXTER, Administrator, *versus* STEPHEN PENNIMAN.

An admission within six years of a promise or contract as undischarged, which would otherwise be barred by the statute of limitations, takes such promise or contract out of the statute. — And if such admission be made to an executor or administrator, there needs no special count to be made in such case.

THIS was an action of *assumpsit*. The declaration contained three counts on three several promissory notes, made by the defend-

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ant to *Hannah Beals*, the plaintiff's intestate, who died within six years before the commencement of the action. The defendant pleaded three several pleas, *viz.*, 1. The general issue. 2. That he never promised within six years before the action was commenced. 3. That the cause of action did not accrue at any time within six years before the action was commenced.

The several pleas were traversed, and issues to the country joined upon them respectively.

On the trial of these issues before *the chief justice*, at an adjournment of the last October term in this county, the plaintiff produced no evidence to support the first count, and gave it up. On the two other counts he produced the notes declared on, and the signatures by the defendant were admitted; one note bearing date September 19th, 1795, and the other bearing date January 20th, 1801. The writ was dated November 2d, 1808.

To take these notes out of the statute of limitations, it was proved by the testimony of a Mr. *King*, with whom
* the notes were left for collection by the plaintiff after [* **134**]
the death of his intestate, that the defendant acknowledged
that the notes were justly due, and ought to be paid. The admission of this testimony was objected to by the defendant's counsel; but that the question might be settled by the whole Court, *the chief justice* overruled the objection; and thereupon the jury found a verdict for the defendant on the first count, and for the plaintiff on the second and third counts, subject to the opinion of the court upon the admissibility of *King's* testimony.

If the Court should be of opinion that the testimony of *King* was improperly admitted, the verdict was to be set aside, and a new trial granted; otherwise the verdict was to stand, and judgment to be entered accordingly.

The action stood continued *nisi* for the consideration of this point; and at an adjournment of the last March term in *Suffolk*, (present *Parsons*, C. J., *Sewall* and *Parker*, *Justices*,) the opinion of the court was declared to the following effect: —

When the parties are living, an admission of a promise or contract as undischarged within six years before action brought, takes it out of the statute of limitations. (1) For the same reason, such an admission made by or to an executor or administrator after the six years, ought to be considered as having the same effect. The *English* practice requires in this latter case a special count. (2)

(1) *Carth.* 470. — 2 *D. & E.* 760, *Lloyd* vs. *Maund.*
(2) *Salk.* 28, *Dean* vs. *Crane.* — [*Sarell* vs. *Wine*, 3 *East*, 409, 6*th Eng. ed.* — *Willes*, 29. — 2 *Chitt* 68. — ED.]

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But this practice has no bearing upon the merits, and it is inconvenient, as tending to produce prolixity of pleading.

The sound principle which ought to govern in the construction of the statute is, that a presumption arises, that the defendant, from the lapse of time, has lost the evidence which would have availed him in his defence, if seasonably called upon for payment. But when this presumption is rebutted by an acknowledgment of the defendant within six years, the contract is not within the intent of the statute. (*a*)

Judgment on the verdict.

(*a*) [*Whitney* vs. *Bigelow*, 4 *Pick.* 110. — *Bangs* vs. *Hall*, 2 *Pick.* 368. — ED.]

[* 135]

* ISAAC THOMPSON, Executor, *versus* JACOB THOMPSON.

Where at the making a promissory note bearing legal interest from its date, an extra premium was also paid, the note was held to be usurious and void.

ASSUMPSIT upon a promissory note, made by the defendant to *Solomon Thompson* or order, and endorsed to the plaintiff's testator, *William Bennett*.

The cause was tried upon the general issue, before *Parsons*, C. J., at an adjournment of the last October term in this county, and a verdict taken for the plaintiff by consent, subject to the following facts contained in the *chief justice's* report: —

On the third of October, 1807, one *Theodore Mitchell* was justly indebted to *Bennett*, the testator, in the sum of 190 dollars 73 cents, and at the same time the defendant was justly indebted to the said *Mitchell* in the same or a greater sum. On the request of *Mitchell*, the testator agreed to discharge his debt, upon the defendant's giving a note for that sum, with an endorser, payable in one year with interest, and also paying to the testator, on the delivery of the note, a sum of money equal to three per centum upon the amount of the principal debt. Pursuant to this agreement, the defendant made and delivered the note declared on, being for the debt justly due, the said *Solomon Thompson* being only a surety, and at the same time paid the further sum of three per centum to the said testator, who thereupon discharged *Mitchell*. If the said note, in the opinion of the Court, be void, as against the statute of usury, the verdict was agreed to be set aside, and a general verdict

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entered for the defendant; otherwise the verdict to stand, and judgment to be entered upon it.

The action being continued *nisi* for the decision of the whole Court, their opinion was delivered to the following effect, at an adjournment of the last March term in *Suffolk*, *Parsons*, *C.* J., *Sewall* and *Parker*, *Justices*, being present:

By the statute of 1783, *c.* 55, for the restraining the taking of excessive usury, it is enacted that all contracts and assurances whatsoever, made for the payment of any principal or money lent, upon or for usury, whereupon or whereby there shall be reserved or taken above the rate of six pounds in the hundred, shall be utterly void.

* In the case at bar, besides the legal interest of six [* **136**] per cent. per annum, reserved in the note, there was paid another sum, equal to three per cent. of the principal. There was, then, more than legal interest reserved by the note, and it thus became usurious and void by the statute. The case of *Fisher* qui tam vs. *Beasley* (1) is an authority in point. This was a prosecution for the penalty, the facts being similar to those in the case before us; and the argument was that the usury was complete on the extra payment made at the time of giving the security, and that the action was therefore barred by the statute of 31 *Eliz. c.* 5, § 5, limiting popular actions to a year after the offence committed. The Court were unanimously of opinion, that the bond given was void. — The verdict must be set aside, and a general verdict entered for the defendant, and judgment accordingly.

(1) *Doug.* 235.

RUFUS WESTON *versus* ELIJAH ALDEN.

The owner of land adjoining to an ancient brook of running water may lawfully divert the water for the purpose of irrigating his close; and an owner of a close below, which becomes less productive by that means, has no cause of action therefor.

THIS was a special action of the case against the defendant for diverting an ancient water-course which passed through the plain-

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ti close, and by which it was fertilized, so as to produce annually a large crop of grass.

The cause was tried before *the chief justice*, upon the general issue, at an adjournment of the last October term in this county, and a verdict found for the plaintiff, by the consent of the parties, subject to the opinion of the Court upon the following report of the judge who sat at the trial.

It was proved that there was an ancient brook of running water, as described in the declaration; and that the plaintiff was seised of the close therein mentioned; and that this water-course first passed by the defendant's meadow, which was bounded on it; that in its natural course it passed by several meadows belonging to persons not parties to the action, and then passed by the plaintiff's meadow, as alleged in his declaration; that the defendant, claiming a right to divert the water for any purpose as he pleased, in fact
[* 137] cut * several sluices in the bank of the water-course, in his own land, that he might, with the water passing through those sluices, irrigate his own meadow; that the water thereby passed on to the defendant's meadow through those sluices, but afterwards passed into the same brook above the plaintiff's meadow, except such part as was absorbed in the defendant's meadow, or evaporated; and that so much of the water was absorbed in the defendant's meadow, or evaporated, in consequence of the sluices so opened by him, that less water than usual came to the plaintiff's meadow, by reason of which his said meadow was greatly damaged, the quantity of grass produced thereon being materially diminished.

If, upon these facts, the defendant had a legal right to divert the water from the said ancient water-course, for the purpose and in the manner aforesaid, the verdict was to be set aside, and a new trial granted; otherwise the verdict was to stand, and judgment to be entered accordingly.

The action was continued *nisi* for the opinion of the Court upon the foregoing report; and at an adjourned session of the last March term in *Suffolk*, present *the Chief Justice*, and *Sewall* and *Parker*, *Justices*, the opinion of the Court was pronounced to the following effect: —

We think, upon the facts reported in this case, that the plaintiff has no right of action, and that the verdict must be set aside. A man owning a close on an ancient brook may lawfully use the water thereof for the purposes of husbandry, as watering his cattle, or irrigating the close; and he may do this, either by dipping water from the brook, and pouring it upon his land, or by making

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small sluices for the same purpose; and if the owner of a close below is damaged thereby, it is *damnum absque injuriâ*.

New trial granted.

[The right to the use of water rests on clear and settled principles. *Prima facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream; but there is no property in the water. Every riparian proprietor has an equal right to use the water which flows in the stream; and, consequently, no riparian proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other riparian proprietors, who may be affected by his operations, no riparian proprietor can either diminish the quantity of water, which would otherwise descend to the riparian proprietors below, nor throw the water back upon the riparian proprietors above. Every riparian proprietor who claims a right either to throw the water back, above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant, or license, from the riparian proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years. — *Wright* vs. *Howard*, 1 *Sim. & Stuart*, 203. — *Mason* vs. *Hill*, 5 *B. & Ad.* 1. — 2 *Nev. & Man.* 747. — 3 *B. & Ad.* 304. — *Bower* vs. *Hill*, 1 *Bing. N. C.* 544. — *Rex* vs. *Trafford*, 1 *B. & Ad.* 874. — 8 *Bingh.* 204. — 2 *Cr. & J.* 265. — And, although every riparian proprietor has a right reasonably to use the water in the stream, and even to take it in small and reasonable quantities from the stream for domestic and other uses, yet he has no right to divert any part of the water of the stream into a course different from that in which it has been accustomed to flow, for the purpose of irrigating his land, or any other purpose, to the prejudice of any other riparian proprietor, without such grant or license. *Arnold* vs. *Foot*, 12 *Wend.* 330. — *Brown* vs. *Best*, 1 *Wils.* 174. — ED.]

[* 138]

* THE NEW BEDFORD AND BRIDGEWATER TURNPIKE CORPORATION *versus* JOHN Q. ADAMS, ESQ.

Where one engages to take a certain number of shares in a turnpike, no action lies against him for the corporation to recover the assessments laid for the purpose of making the turnpike.

THIS was an action of the case in *assumpsit* brought against the defendant for not paying the amount of certain assessments for the expense of making the said turnpike road.

The declaration contained six counts. The third was for 1500 dollars had and received by the defendant to the plaintiffs' use. — The sixth count was, " for that the said *J. Q. A.*, at *Plymouth*, on the 30th day of March, 1804, by a certain writing by him subscribed, commonly called a subscription paper, in consideration that the said corporation had permitted him to become associated with them, and interested in the funds to be raised for building their said turnpike road, and entitled to one fiftieth part of all the income, profit and toll, that should arise and accrue to said corporation from the road, as well as from the corporate powers and franchise

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to them granted by said act of incorporation, promised said corporation to pay them ten shares or parts of five hundred of the whole expense they should incur in building said turnpike, on demand; which said ten shares, the plaintiffs aver, amount to one fiftieth part of the five hundred shares; and the plaintiffs further aver that the whole expense of building said road, and the bridges which make a part of said road, amounts to fifty thousand dollars, whereof the said ten shares or fiftieth part of the said *J. Q. A.* amounts to one thousand dollars, of which he has had notice, viz., on, &c. Yet though requested," &c.

The action was tried upon the general issue, pleaded to all the counts, before *Sedgwick*, J., at the sittings after the present term; and a verdict was found for the plaintiffs upon the two counts above recited, and the damages assessed at 1311 dollars; and upon the other counts for the defendant.

[* 139] * The verdict was taken by consent, subject to the opinion of the Court upon the report of the judge who sat in the trial, it being agreed that the verdict should be amended, or a general verdict entered for the defendant, as the opinion of the Court should be.

The judge reports that the general question at the trial depended on the construction of the paper writing above referred to, which was subscribed by the defendant and others, and was of the following tenor, *viz.*: —

"We the subscribers, desirous to promote the building of a turnpike and bridges from *New Bedford* to *Weymouth*, comprehended in a petition signed by *W. Roach*, Jun., and others, granted by the honorable legislature in their present session, have divided the expense of building said turnpike and bridges from *Thompson's* pond in *Middleborough*, to communicate with the *Braintree* and *Weymouth* turnpike, in the town of *Weymouth*, into 500 shares, and engage to take the number of shares affixed to our names. January 30, 1804."

The material allegations contained in the sixth count were proved, and it was also proved that the defendant subscribed the said paper after the passing of the act of incorporation by the legislature, and before any meeting of the persons incorporated and their associates.

The principal question arising on the above-recited subscription paper was, whether the defendant was rendered by it liable to an action for the assessments made on the shares subscribed by him.

After the verdict the cause was continued *nisi* for the consideration of the Court, and, being called up for argument at the following March term in *Suffolk*,

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Whitman, for the defendant, contended, that the case of *The Andover and Medford Turnpike* vs. *Gould* (1) was in point to show that no implied promise could be raised from this paper to pay the assessments, and that the only remedy, for the corporation, provided by law, was the sale of the shares. — The subscription paper was not intended to give *a remedy by action, [* 140] but simply to make each subscriber a member of the corporation, subject to the legal duties belonging to him in that character. — Each corporator agreed to take a certain specified number of shares, and on those shares, not on the individual, were the expenses assessed; which shows that the individuals were to be liable merely as members of the corporation, in proportion to their interest in the stock or funds. — The term *expense* in the paper must be construed to mean such interest, otherwise the subscriber was merely to pay his money, without prospect of any profit or remuneration. — Where a contract is so doubtful in its terms that no certain and satisfactory interpretation can be given, it can never be enforced by action at law. Certainly in this case there is no promise to pay money; nothing more than an engagement, as a member of the corporation, and a holder of ten shares, to be liable to all the duties and claims belonging to that situation.

Mitchel for the plaintiffs. A corporator may legally contract with the corporation of which he is a member; and if, in an association of this kind, he will expressly promise to pay his assessments, an action at law lies for the corporation to recover them, notwithstanding the cumulative remedy by sale of the shares. This latter remedy is so well known to be an inadequate one, that the Court will incline to support one more effectual, where it can be done; and especially in a case situated like the present, in which two juries have charged the defendant, after the most thorough investigation of the facts and principles of the cause.

In examining the paper subscribed by the defendant in this case, and attending to the consideration expressed in it, it is believed that the Court will find both the form and substance of a promise to pay a certain proportion of the expenses of making the turnpike. The subscribers, anxious that the enterprise should succeed, divide the expense into five hundred shares, and engage to take the number *annexed to their names respectively. [* 141] The word *shares* must refer to the expenses, and not merely to the fund or stock, or the whole paper, considered as an agreement or association, is an absurdity. Nor is it an objection to this construction, that the amount of the expense was uncertain at the time of subscribing; for the amount of the stock or funds was

(1) 6 *Mass. Rep.* 40.

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equally uncertain. The whole transaction furnishes a sufficient consideration for a promise. A few persons had procured an incorporation for themselves and such others as should associate with them for the object in view. The defendant, "desirous to promote the building of the turnpike," with a view to induce the corporation to proceed in the undertaking, subscribes for ten shares. The corporation, relying on the subscription of the defendant and others, have completed the turnpike. Here, then, are united the form and the substance, the language and the consideration, of a good and valid promise; upon which the verdict was rendered, and upon which the plaintiffs confidently hope for judgment.

By the Court. The question, in this case, is, whether the defendant is liable to an action of *assumpsit* for neglecting to pay the sums assessed on the shares in the stock of the corporation, for which he became a subscriber. The answer to this inquiry must depend upon a construction of the writing which the defendant subscribed. Several cases of this kind have already been decided in this Court; and each of them on the force and effect of the engagement entered into. The general principle upon which they all rest is, that where the party makes an express promise to *pay* the assessments, he is answerable to the corporation upon such promise, and may be compelled to the performance of it by action at law. (*a*) Where, on the other hand, one, by subscribing the act of association, simply engages to become a proprietor of a certain number of shares, without promising to pay assessments, there the only remedy which the corporation has, is by sale of the shares to raise the sum assessed on them.

[* 142] *In the subscription paper in this case, the subscribers divide the expense into five hundred shares, and each engages to take the number of shares affixed to his name. In our opinion, this cannot amount to any thing more than an agreement into how many shares the stock shall be divided, and to whom those shares shall belong. There is no express promise to pay, nor is any language used, from which the law can raise an implied promise. It may be observed, also, that this whole transaction passed before there had been any meeting of the corporation to authorize the receiving of subscriptions; and on this ground, also, the paper cannot furnish evidence of a contract.

On the whole, it is our opinion that the plaintiffs have not maintained their action. The verdict must therefore be set aside, and, pursuant to the agreement of the parties, a general verdict entered for the defendant.

(*a*) [*Salem Mill Dam Corporation* vs. *Ropes*, 9 *Pick.* 187. — *Taunton and South Boston Turnpike* vs. *Whitney*, 10 *Mass.* 327, and *note to* 3*d edition.* — ED.]

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF NORFOLK, OCTOBER TERM, 1811, AT DEDHAM.

PRESENT:

HON. THEODORE SEDGWICK,
HON. SAMUEL SEWALL,
HON. ISAAC PARKER,
} JUSTICES.

NATHAN KENNEY AND EUNICE, HIS WIFE, *versus* RICHARD D. TUCKER.

Where a child, in consideration of a sum paid him by his father, by way of advancement, releases his claim to his share of the inheritance, although it may appear that the sum so paid was much less than his purparty of his father's estate at his death would have been worth, it shall bar him of his share or purparty.

THIS was a writ of entry, in which the demandants counted upon their own seisin, in right of the wife, of one forty-second part of the lands described in their writ, and upon a disseisin by the tenant.

The parties submitted the action, or rather the right of the demandants to recover in any form of action, to the determination of the Court, upon a statement of facts, in substance as follows: —

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The demandant *Eunice Kenney* is the daughter of *Thomas Crane*, Jun., who was the eldest son of *Thomas Crane*, Sen., and died in the year 1787, intestate, living his father, and leaving the said *Eunice* and six other children his heirs at law. *Thomas Crane*, Sen., died in the year 1804, intestate, and seised of the demanded premises; and his real estate, after payment of the debts and charges of administration, exclusive of his widow's [* 144] dower, was appraised at the sum * of 3925 dollars. He left six children, viz., *Elijah Crane*, *Ruth Barker*, *Sarah Bird*, *Mary Wales*, *Rebecca Crane*, and *Abigail Gill*, together with the said children of his son *Thomas*, his heirs at law. The said *Thomas Crane*, Jun., on the 29th of April, 1774, being then more than 21 years of age, by his deed of that date, in consideration that his father and mother had, at his request, and as, and for his advancement in his said father's and mother's estate, advanced and paid him the sum of £133, 6*s*. 8*d*. lawful money, (equal to 444 dollars 44 cents,) released and quitclaimed to his said father and mother, and their heirs and assigns, forever, "all such right, estate, title, interest, and demand whatsoever, as the said *Thomas Crane*, Jun., had, or ought to have, in or to all the estate, real or personal, of the said *Thomas Crane* and *Mary Crane*, that now is, or may be hereafter, by any ways or means whatsoever, that would otherwise be mine by heirship;" The said deed being made, and the said money paid, with the knowledge of the family of the said *Thomas*, Sen. — A similar deed, and for the like consideration, was afterwards made by the said *Elijah Crane*. — The estate of the said *Thomas Crane*, Sen., after his decease, and after payment of his debts, &c., was, in the year 1807, by a warrant from the judge of probate for this county, divided among his children and heirs, (except the said *Elijah*, and the children and heirs of the said *Thomas*, Jun.,) who entered and became possessed of the same, agreeably to said division. — The tenant *Tucker* derives his title and possession from the said children and heirs of *Thomas Crane*, Sen.

Upon these facts it was agreed that if, in the opinion of the Court, the demandants were entitled to recover in any form of action, the tenant should suffer judgment to go against him by default; otherwise the demandants were to become nonsuit.

Whitman, for the tenant, insisted that the demandants were barred, 1st. By the release of their father, *Thomas Crane*, Jun., above recited; and, 2d. Also by the proceedings of the Probate Court.

[* 145] * *Richardson*, for the demandants, contended that they were not estopped by the distribution made by order of the Probate Court. They were no parties to those proceedings.

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nor had they any knowledge of them. — Neither were they bound by their ancestor's release, which would have no operation to pass rights not existing.

This case is different from that of *Quarles* vs. *Quarles*. (1) In that case the advancement was held by the court to be in full; but neither the value of the whole estate nor of the advancement appeared. Here both were agreed; and it is apparent that the advancement was not near the proportion that would have accrued to *Thomas*. It could operate only as a partial advancement; and it was the duty of the Probate Court to ascertain the proportion of *Thomas's* share that had been advanced him, and to direct the commissioners to make the division accordingly.

But by the Court. It is impossible to support any well-founded distinction between *Quarles's* case and the case at bar. We are all of opinion that, upon the facts stated, the tenant is entitled to judgment.

Demandants nonsuit

(1) 4 *Mass. Rep.* 680.

JOSEPH N. ARNOLD *versus* EZEKIEL BAILEY AND OTHERS.

In debt on bond to prosecute a writ of replevin, the plaintiff is entitled to recover the value of the goods replevied, with the damages and costs recovered, and interest on such damages and costs from the date of the judgment in replevin to the time of rendering judgment on the bond.

DEBT on a bond conditioned to prosecute a suit in replevin.

The defendants, being defaulted, prayed to be heard in equity. Upon the hearing it appeared that the plaintiff, a deputy sheriff, had attached the goods on mesne process, on which final judgment had been rendered.

B. Whitman, for the plaintiff, claimed the amount of that judgment.

But the Court said that the true measure of the plaintiff's damages in this action was the value of the goods replevied, with the damages and costs recovered in the action of replevin, and interest on the two last articles from the date of the judgment in replevin to the present time.

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*DAVID TOWNSEND *versus* EBENEZER WELD.

In covenant broken upon a conveyance of land with warranty, it is not competent for the defendant to give parole evidence that the plaintiff had knowledge of the title, by which he had been evicted, and agreed that the defendant should not be charged in the event of such an eviction.

COVENANT broken on a deed of the defendant to the plaintiff, made, for the consideration of 1676 dollars, to convey part of a messuage, &c., with covenants of a lawful seisin, good right to sell, premises free of all encumbrances, &c. The plaintiff avers that the defendant was not lawfully seised, that the premises were not free of encumbrances, and that *Gillam Taylor* had recovered the premises in a suit against the plaintiff, and ejected him by a lawful title. — The defendant pleads in bar, that *Townsend*, at the time of the conveyance, knew of the deed of defeasance under which *Taylor* recovered, and accepted the deed with an agreement that the defendant, *Weld*, should not be charged in the event of a recovery under that deed. This is traversed in the replication, and an issue taken thereon.

Upon the trial of this issue, before *Sewall*, J., at the last March term in this county, the defendant offered to prove the agreement averred in his plea in bar, by parole testimony, which the judge ruled to be incompetent, and the parties proceeded to an inquiry of damages. The plaintiff finally consenting to take the sum mentioned as the consideration of the deed, with interest thereon, and his expenses in *Taylor's* action against him, including the fees of counsel, a verdict was accordingly found for the aggregate of these sums. The defendant, waiving his review, moved for a new trial, for the judge's rejection of the parole testimony.

B. Whitman, in support of the motion, contended that it was competent for the defendant to give parole evidence of the fact put in issue by the pleadings. In the nature of the thing, no other evidence could be expected. If the plaintiff would take such a deed, with the knowledge of such a fact, capable of proof, he ought not now to recover damages against the mutual understanding of the parties to the contract at the time of executing it. The evidence was not offered to set up a title to real estate in
[* 147] the defendant; *but only to show the intent and meaning of the contract, or to explain what may be considered as a latent ambiguity in the deed, upon which the action was brought

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L. Richardson for the plaintiff.

Curia. This was an attempt to control the effect of a written and sealed instrument, by parole evidence, which is never permitted. Supposing this encumbrance known, it was still competent to the defendant to covenant with his grantee to save him harmless from its effects; and if such was not his intention, he should have excepted it out of his general covenants.

Judgment on the verdict

JOSEPH N. ARNOLD *versus* JOSEPH ALLEN AND JOSEPH ALLEN, JUN.

The condition of a replevin bond was to prosecute the action at the *county court*, next to be holden at, &c., rightly describing the next term of the Common Pleas, and held good.

To a replevin bond, the defendant pleads in bar, that he duly entered his action at the Common Pleas, and prosecuted it with effect; that, upon a judgment there, an appeal was interposed by the plaintiff in replevin; that the creditor, at whose suit the chattels had been attached, had received full satisfaction for his damages and costs, and that the officer, plaintiff in the action on the bond, had been indemnified, and kept harmless, &c.; and, on demurrer to this plea, the defendant had judgment.

DEBT on bond. Upon oyer it appeared that the bond was made to the plaintiff, as a deputy sheriff of the county of *Norfolk*, with the following condition, *viz.*: "The condition of the above obligation is such, that if the above bounden *J. A.* and *J. A.*, Jun., do appear at the next *county court* to be holden at *Dedham*, within and for the county of *Norfolk*, aforesaid, on the last Tuesday of September next, and then and there *prosecute his action with effect* against the said *Arnold*, for taking and detaining in his custody" [*certain oxen and other chattels described,*] "and do make a return thereof, if a return shall be adjudged by law; and also to keep harmless and indemnify the said *Arnold*, for touching and concerning the replevying and delivery of the said oxen, &c.; then the above obligation shall be void; otherwise remain in full force and virtue."

* After oyer, the defendants plead in bar, that before [* 148] the execution of the bond declared on, the plaintiff held and detained the goods and chattels mentioned in the condition thereof as a deputy sheriff, on writs against one *David Holbrook*, at the suit of one *N. P. Hewes*; that the said bond was made and

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given to the plaintiff in his said office, for the sole use and benefit of said *Hewes*, to whom all moneys by the plaintiff thereon to be recovered by way of damages were by law to be paid over; and that the defendants, on the said last Tuesday of September, appeared at the county court, being the Court of Common Pleas, then holden at *Dedham*, within and for the county of *Norfolk*, and prosecuted the said *Joseph's* action with effect against the plaintiff for the taking and detaining in his custody the chattels aforesaid; and thence the said action was continued to the then next term of said court, when and where the plaintiff had judgment for his costs of suit only, without damages or a return awarded; from which judgment the said *Joseph Allen* appealed to the then next Supreme Judicial Court, and recognized, &c. The plea then avers that *Hewes* had received full satisfaction for all the damages and costs recovered by him in his suits against *Holbrook*, and had discharged the plaintiff from his liability under and by virtue of said suits, and the executions issued thereon; and that the plaintiff had been kept harmless and indemnified for touching and concerning the replevying and delivery of the said chattels, according to the meaning and intent of the said writing obligatory.

To this plea in bar the plaintiff demurs generally, and the defendants join in demurrer.

J. Richardson, in support of the demurrer, argued that the plea did not cover the condition of the bond: it is not averred that *Allen* prosecuted his action with effect. By his appeal he entirely vacated the judgment of the Common Pleas, and destroyed its effect. As to the averment that *Hewes* had received satisfaction of his demands against *Holbrook*, that satisfac-
[* 149] tion might have been by an extent on * the lands of *Holbrook*; or he might have paid the money himself; or, for any thing alleged to the contrary, the plaintiff may have paid it from his own pocket. If *Holbrook* made the satisfaction, he is entitled to have the chattels restored to him, which were taken to secure the payment. And the plaintiff in that case is accountable to him for them. (1)

B. Whitman, for the defendants, contended that the bond was void, as there was no such court known as the *county court*. When the defendants had failed to enter their appeal, the plaintiff should have entered his complaint, and thereupon obtained his final judgment, and thus have avoided this circuity of action by resorting to the bond. But, at any rate, the plea avers that the plaintiff has been

(1) 1 *Mass. Rep.* 421, *Pike* vs. *Huckins*. — 2 *Mass. Rep.* 514, *Ladd* vs. *North*. — 3 *Mass. Rep.* 303, *Flagg* vs. *Tyler*. — 4 *Mass. Rep.* 103, *Hicks* vs. *Atkins*.

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saved harmless; and this being confessed by the demurrer, the penalty of the bond is saved. It is also averred that the creditor *Hewes* is satisfied.

Richardson, in reply. The form of the bond in replevin is not prescribed by the statute, so that the name of *county court* was well enough, the Common Pleas being the county court, and the only one; and the time and place of its session was correctly stated. But it is too late for the defendants to object to the form of the bond; and if it has any validity, they have confessed a breach in not prosecuting their action to effect.

Per Curiam. The first objection relied on by the defendant arises on the face of the bond, which was conditioned for *Joseph Allen's* appearance at the next *county court*. It is said there was no court known by that name, and the defendant has argued from this, that the bond was void. — We are all satisfied that this objection cannot prevail. It would be yielding too much to technical nicety. The words *county court* must intend the Court of Common Pleas; and if this was such a variance from the statute, that the bond could not be held valid under it, it would still be good at common law.

*Are, then, the facts relied on by the defendants [*150] sufficient for their discharge? — The action was to be prosecuted with effect. It was entered and prosecuted, and after an appeal from the judgment of the Court of Common Pleas was interposed, the original creditor *Hewes* was satisfied; and therefore he can have no claim on the plaintiff on account of the attachment of the cattle. The plaintiff was to be saved harmless; and the plea in bar avers that he has been so, which is confessed by the demurrer. If the cattle have not been returned, still the plaintiff should not have commenced his action, until he was in some way damnified; for until then he had no cause of action.

Plea in bar adjudged good.

JOHN CLEVERLY *versus* JAMES BRACKETT AND LEMUEL BRACKETT.

Where a creditor has received from his debtor a personal chattel in pledge, as collateral security for the debt, he cannot cause other property of the debtor to be attached in an action for the debt, without first returning the pledge.

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CLEVERLY vs. BRACKETT & AL.

TRESPASS for breaking and entering the plaintiff's close, and taking and carrying away one gelding and two heifers, the property of the plaintiff.

Lemuel Brackett, one of the defendants, pleaded not guilty, and stated, pursuant to the statute of 1792, *c.* 41, as constable of the town of *Quincy*, an attachment of the heifers by the direction of the other defendant, *James Brackett*, upon a writ tested April 6th, 1810, in his suit against the said *Cleverly*, and a summons left at his usual abode, &c.

James Brackett, the other defendant, pleaded the general issue; and for a second plea justified the taking of the gelding and heifers by virtue of a writ of attachment at his suit against the now plaintiff, upon which he delivered, and the said *James* accepted, the said gelding as a security in part; and that afterwards, by virtue of the same writ, the said gelding being insufficient, &c., the said *James* and *Lemuel* entered the close where, &c., and finding the said gelding and heifers, and having caused the heifers
[* 151] to be attached * by the said *Lemuel*, constable, &c., the said *James* and *Lemuel* removed the said gelding and heifers, as they lawfully might, &c.

To this plea the plaintiff replies *de injuriâ suâ propriâ;* and traverses the delivery of the gelding; and avers, as to the taking of the heifers, that before the taking, &c., the said *Lemuel* had served and executed the said writ of attachment.

Issues being tendered on the delivery of the gelding, and on the prior service of the writ, these and the general issues tendered were joined by the defendants and the plaintiff respectively, and tried before *Sewall*, J., at the last March term in this county.

At the trial the plaintiff proved, that *Lemuel Brackett* and another person, thought by the witness to be *James Brackett*, were seen driving two heifers, and leading a gelding, between 9 and 10 o'clock in the evening of the 9th of April, 1810; the witness knowing the heifers to be the plaintiff's, and believing the gelding to be his also. It was also proved that, previously, in the forenoon of the same day, a summons in the suit of *James Brackett*, against the said *Cleverly*, had been left at his house by *Lemuel Brackett*, declaring an attachment, &c., in common form. It appeared also, from the testimony adduced at the trial, that the gelding was worth 50 dollars, and that the heifers were worth 15 dollars each.

The judge expressed his opinion to be, that in attaching personal property to secure a debt, the creditor and officer, if sufficient had not been taken before the delivery of the summons, were justifiable in proceeding afterwards, before a return of the writ, to make a

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further attachment: (a) but if sufficient had been previously taken, then a further attachment, after delivery of the summons, or any proceeding oppressive in fact to the supposed debtor in the writ of attachment, were not to be justified. No attachment of the gelding being returned, and the delivery and acceptance of the *gelding as a security upon the agreement of the [*152] parties in the former suit being vacated by the determination of the creditor to make an attachment upon his writ, the judge directed a verdict for the plaintiff, subject to the opinion of the Court upon the foregoing facts reported by him; the defendants moving for a new trial.

T. B. Adams, of counsel for the defendant *Lemuel Brackett*, considered the case of the two defendants as standing on very distinct grounds. His client, he insisted, had done no more than his official duty compelled him to do. He attached the chattels of *Cleverly*, as his precept commanded him, and he made due return of the writ and of his service of it. If *James Brackett* should appear to have made himself liable to the plaintiff's action, by any irregularity in his conduct, it would seem to savor greatly of hardship to apply the same considerations to *Lemuel*, who had conducted himself with propriety, in every view, except that he had happened to be seen in company with one who had committed a trespass.

S. D. Parker, who appeared for the other defendant, *James Brackett*, argued that his whole statement, taken together, was a sufficient justification. He received the gelding as collateral security for his debt; and, it being insufficient, he caused the heifers to be attached, as he had a good right to do. Nor did the attachment vacate the partial security he had previously obtained.

Whiting, for the plaintiff, insisted that the directions of the judge at the trial were correct, and, the jury being the proper judges of the evidence, there was no cause to set the verdict aside, and send the parties to another trial.

Curia. The brief statement filed by the constable in this case is defective, inasmuch as it does not show the disposition which he made of the cattle which he attached. His posterior conduct may have been such as to make him a trespasser *ab initio*. As we shall send the action to another trial, he will have opportunity to amend it.

*As to the defence set up by the other defendant, we [*153] are of opinion, that after he had received the gelding as a pledge for his demand against the plaintiff, he could not lawfully attach other property for the security, without first returning the

(a) [Such a proceeding would seem to be quite irregular. — ED.]

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pledge; for he could not know how far the pledge was competent to his full security. (*b*) By thus unlawfully attaching the heifers, therefore, he committed a trespass. And if the constable knew of the gelding's having been pledged as it was, he also was a trespasser in attaching the heifers.

It is not easy to suppose such a state of the case, as would entitle the plaintiff to damages for both the gelding and heifers. Yet the jury have here found the defendants guilty of the whole trespass charged.

As the case is much involved, and the whole testimony furnished at the trial was very slender, we order the verdict to be set aside, and a new trial to be had; but, as the subject of the dispute is of inconsiderable value, we hope the parties will adjust the business out of court, and that we shall hear nothing more of it.

New trial ordered.

(*b*) [There seems to be no reason why he might not lawfully have attached in this case, as well as in the case of a mortgage of real estate. — ED.]

EBENEZER CLAP *versus* JOHN GUILD.

It is no sufficient ground to quash a writ of replevin, that the officer has taken bond for a larger sum than the writ directed.

IN replevin of goods, which had been attached by the defendant as a deputy sheriff, the goods were valued at 150 dollars, and the coroner was directed to execute the precept, provided the plaintiff in replevin should first give bond in the sum of three hundred dollars. But the coroner actually took a bond in the sum of 800 dollars, the plaintiff's damage in the writ, upon which the goods were attached, having been laid at 400 dollars; and this had probably misled the coroner.

S. D. Parker appeared for the defendant, and moved for a rule upon the plaintiff, to show cause why judgment should not be entered that the plaintiff take nothing by his writ, and a return of the goods be awarded to the defendant; because the [* 154] bond was not taken according to the * command of the writ, nor pursuant to the directions of the statute. — And he argued that the writ of replevin being a conditional precept, the officer had no authority to serve it, unless the condition was legally

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complied with. (1) Nor was this a captious or merely formal objection; for if the defendant should hereafter have occasion to bring an action on the bond, this very point might be made in the defence, and he might be wholly deprived of the security to which by law he is entitled.

Harrington, for the plaintiff, cited the case of *Morse* vs. *Hodsdon & Al.*, (2) as answering all the objections, and curing the difficulty stated for the defendant.

Curia. We are all of opinion that this motion cannot prevail. The bond in this case, being for more than twice the value of the goods replevied, will always be subject to reduction on a hearing in equity. It was certainly sufficient to justify the officer in serving the writ of replevin; and indeed it may have been true that the defendant himself insisted on a larger bond than the writ directed, alleging that the goods were greatly undervalued in the writ. Whether this was the case or not, the bond being in too large a sum can never operate to the defendant's injury. The service was legal, and the defendant can take nothing by his motion.

(1) 3 *Mass. Rep.* 304, *Flagg* vs. *Tyler.* — *Ibid.* 310, *Moors* vs. *Parker & Al*
(2) 5 *Mass. Rep.* 314.

LEONARD KINGSBERY *versus* BENJAMIN SLACK AND OTHERS.

Where the legislature had set off one with his estate from one parish in a town, and annexed them to another parish, it was held that the effect of the act ceased at the death of the person so set off, and that the land owned by him, with its occupants, then reverted to the former parish.

THIS was an action of trespass for taking and carrying away certain chattels of the plaintiff's. The cause was submitted to the Court on an agreed state of facts, of which the following is the substance.

On the 17th of June, 1800, an act was passed by the legislature, (1) reciting in the preamble, that *Jonathan Kingsbery*, Jun., had represented that it was very inconvenient for him to attend public worship in the westerly precinct * of *Needham*, to [* 155] which he then belonged, and praying that he might be annexed to the easterly parish in said *Needham*; and thereupon

(1) *Stat.* 1801, *c.* 27. — 2 *Mass. Special Laws*, 404.

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enacting that the said *Jonathan* and his estate be set off from the said precinct, and annexed to the said parish; *provided* that he should be holden to pay all taxes assessed against him in the precinct prior to the passing of the act; and also that he should be holden to pay his proportion of *three hundred dollars*, then remaining due to the then minister of the precinct, in part of his settlement, in the same manner as if the act had not been passed.

The plaintiff is the son of the said *Jonathan*, and, ever since his father's death, has owned and occupied the estate intended in the act above recited.

The defendants are legal assessors of the said westerly precinct, and, in pursuance of a vote of said precinct to levy a tax for precinct purposes, had assessed the sum so voted on the polls and estates of the said precinct, and also, in due form, assessed on the plaintiff a part of said sum. The assessment, with a warrant to collect the same, were duly delivered to a collector, who distrained the plaintiff's chattels, which distraining is the trespass complained of.

If the Court should be of opinion that the plaintiff's estate aforesaid is by law liable to be taxed in the said westerly precinct, he agreed to become nonsuit; otherwise the defendants agreed to be defaulted; and judgment in either event to be rendered accordingly.

The cause was briefly argued, at the last September term in this county, by *Dexter* and *J. Richardson* for the plaintiff, and *B. Whitman* for the defendants.

For the plaintiff, it was contended, that the effect of the statute was to annex the estate permanently to the parish, and thus to alter the boundary between the precinct and parish. This was argued from the reason stated in the preamble, *viz.*, the inconvenience to the owner of the estate in attending the precinct meeting; for this inconvenience must, in its nature, be equally great to [* 156] every one living on * the estate; and it is proper to presume that the legislature intended the remedy to be as extensive and as durable as the inconvenience. If a mere personal relief to the petitioner, on account of bodily infirmity, or for any other reason, applicable to him only, was all that was asked or granted, there was no need of the interference of the legislature He might have consulted his own convenience in choosing which meeting he would attend. Precincts and parishes are territorial corporations, and the land was all that could be taken from one, and added to the other. The inhabitants of that land for the time being are made members of the parish. If another construction be made, and the charge considered as personal only, it would follow that *Jonathan Kingsbery* would have continued a member of the

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parish, if he had sold his estate, and removed into another town or county.

Whitman, for the defendants, insisted that the intention of the statute was to give a personal convenience to *Jonathan Kingsbery* only; and he argued this from the general policy of the law as to territorial parishes, regarding the simplicity of their lines, and their ability to support the expenses of public worship. — The preamble implied a personal inconvenience only, and for this only was the remedy provided. — The provisoes, being merely personal, viz., that *J. K.* himself should pay certain moneys, show also that the whole operation intended to be given to the act was confined to the person, who had petitioned for and was accommodated by it.

The cause stood continued to this term for advisement; and now the justices present delivered their opinions to the following effect: —

PARKER, J. The decision of this action depends wholly upon the construction to be given to the statute which set off *Jonathan Kingsbery*, Jun., and his estate from the westerly precinct, and annexed them to the easterly parish in *Needham*. The words of the act do not convey to my mind an intention in the legislature to make a permanent * alteration in the territorial [* 157] limits of the two parishes, but rather to grant a personal convenience to the person, at whose instance the act passed. The inconveniences, which gave rise to his application, might be peculiar to him. A variety of considerations may be conceived, which should make it desirable to him to change his place of worship, which would have no application to his son, or to any person, who might afterwards possess the estate then held by him. The act does not state the inconvenience to arise from the relative situation of the land; nor does it mention the heirs or successors of the then owner; as is, I think, usual and natural, where a permanent transfer of the land from one parish to another is intended to be made It appears to me that as soon as *Jonathan Kingsbery* died, the statute ceased to operate, and his estate reverted to the westerly precinct. Of consequence, my opinion is, that the defendants were bound to tax the plaintiff, and that the facts agreed do not support his action.

SEWALL, J. The plaintiff belongs to the westerly precinct in *Needham*, and is liable to be taxed therein, unless the act of the government, which annexed his father, with his estate, to the easterly parish in that town, has made the land, which then constituted his father's estate, and which is now the estate of the plaintiff, a part of the latter parish. But I cannot think this to be the true construction of the statute in question. Upon looking into the numerous acts which have been made for similar purposes, I find that

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where a permanent change is contemplated, the land is described by its boundaries, or in some other manner; and in one act at least it is declared that the land shall *forever* be, &c., — When nothing of this kind is contained in any such law, I apprehend the legislature must be understood to mean an accommodation merely personal to the individual; that upon his death the provision is at an end, and the land returns to, and again constitutes a part of
[* 158] the territory from * which it was before taken, and, with the owners or occupants, becomes liable to taxes therein.

If the plaintiff is desirous of being attached to the east parish, he may probably obtain his wish by petitioning the legislature, as his father did. Until then I consider him and his estate as lying within the limits of the westerly precinct, and to be legally ratable there. My opinion, of course, is that the defendants, on the facts before us, are not chargeable in this action.

SEDGWICK, J. The question, in this case, for the decision of the Court, upon the facts agreed, is, whether the plaintiff is liable to assessments for parish taxes in the westerly precinct of *Needham;* and this question depends altogether upon the construction which ought to be given to the act of the legislature, referred to in the case stated. By that act, (which was passed upon the representation of *Jonathan Kingsbery*, that it was very inconvenient to him to attend the public worship of God in the westerly precinct, and his request to be annexed to the easterly parish in *Needham*,) it is provided that the said *Jonathan* and his estate, belonging to the W. precinct, be set off from the said precinct, and annexed to the said E parish.

Was this provision personal to him, or was it a permanent alteration of the territorial limits of the precinct and parish?

Acts of this kind vary much in their modes of expression. Some of them describe the boundaries of the land intended to be included in the provision; but much the larger part of them use language similar to that in the act under consideration.

The inconvenience to the then occupant of the land was the ground of passing the law; and no reason has been suggested, and none occurs to my mind, why that inconvenience is not as great to the plaintiff, the present occupant, as it was to his predecessor. The limits of these parishes were altered in the life of *Jonathan Kingsbery;* and there is in the statute no time fixed
[* 159] when it should cease to operate. *I know not that we can put a limitation to it. The reason which occasioned its enactment still existing, I cannot say that it was intended as a personal accommodation to the then tenant only, and that its operation ceased at his death.

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I might, perhaps, have brought my mind to doubt on this question, if I had not known very many instances, in which the practical construction of provisions of this kind has been, that they were not intended as mere personal grants to the individual named, but as a perpetual annexation of the lands into whose hands soever they might afterwards come.

My opinion, therefore, is, that the plaintiff is a member of the east parish in *Needham*, and there duly taxable for parochial charges; and that of course the defendants, assessors of the west precinct, acted without authority of law in taxing him for the charges of that precinct, and thereby made themselves liable to this action of the plaintiff. But a majority of the judges being of a contrary opinion, the judgment of the Court is with the defendants.

Plaintiff nonsuit

ALPHEUS CAREY *versus* JONATHAN RAWSON

An agreement was made, under seal, that a deed to be executed should be deposited with a third person, until a sum of money, advanced by the grantee to the grantor, should be repaid, or until a day specified; and in default of such repayment at the day, it should be delivered to the grantee, who might thereupon enter, &c. — It was held that such deed, together with the agreement in writing, constituted a mortgage.

THIS was a writ of *entry sur disseisin*, in which the demandant counted upon his own seisin, and upon a disseisin by the tenant.

The tenant prays to be heard in chancery on the suit, and avers that at the time when the conveyance, under which the demandant claims the land described, was executed, *viz.*, on the 7th of April, 1808, the demandant made and executed to him a deed of defeasance, which he sets forth.

It purports an agreement between the parties, that *Rawson*, in consideration of 2000 dollars, to be paid him by *Carey*, *on *Rawson's* executing a conveyance of the land, &c., [* **160**] to him in fee, will execute such a conveyance; that *Carey* will thereupon pay him that sum; that the deed of conveyance shall, after being registered, be deposited with *J. Q. Adams*, Esq., until the said sum shall be repaid with interest, or until the 7th of April, 1810; and that, in default of such payment, the deed shall be delivered to *Carey*, who may thereupon enter upon the land, and from thence take the profits to his own use.

The tenant then avers that the conveyance, in the said deed of

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defeasance mentioned, is the same, under which the demandant claims the demanded premises, and that, by the same deed of defeasance, the said conveyance became a mortgage, and a conveyance on condition to be void on payment of the said sum of 2000 dollars with interest on or before the 7th day of April, 1810; and he confesses the forfeiture of the condition, &c., and, according to the statute in that case made and provided, prays to be heard in chancery touching the same, and that judgment may be given in chancery, that he may redeem the same by paying the just debt and damage due thereon.

To this answer the demandant demurs generally, and the tenant joins in demurrer.

T. B. Adams, of counsel for the demandant, thought this case distinguishable from all that had passed under the consideration of the Court, the defeasance being *prior* to the deed of bargain and sale. It was the intention of the parties to the transaction to avoid the inconveniences attending on a mortgage. The demandant wished that intention effected; but *Adams* discovered no great confidence in the point.

Whiting for the tenant.

The Court, without hesitation, decided that the two deeds must be treated as parts of one transaction, and together constituted a mortgage; and that the tenant, having confessed the forfeiture, should be heard in chancery. (*a*)

(*a*) [*Flagg* vs. *Mann*, 2 *Sumn.* 486. — *Van Buren* vs. *Olmstead*, 5 *Paige*, 9. — *James* vs. *Johnson*, 6 *Johns. Ch.* 417. — 2 *Cow.* 246. — *Day* vs. *Dunham*, 2 *Johns. Ch.* 289. — 15 *Johns.* 555. — *Hicks* vs. *Hicks*, 5 *Gill & Johns.* 76. — *Edrington* vs. *Harper*, 3 *J. J. Marsh.* 356. — *Harrison & Al.* vs. *The Trustees of Phillips Academy*, 12 *Mass.* 456. — *Rice* vs. *Rice*, 4 *Pick.* 349. — *Newhall* vs. *Burt & Al.* 7 *Pick.* 157. — Sed vide *Flagg* vs. *Mann*, 11 *Pick.* 475. — *Bodwell* vs. *Webster*, 13 *Pick.* 411. — ED.]

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* JOTHAM JACOBS *versus* SAMUEL TOLMAN.

A prisoner for debt, having given bond for the liberty of the yard, committed no escape by passing the nights in a house hired and appropriated by the Sessions for the use of debtors who had given bonds, although the keeper of the jail exercised no control over such house.

DEBT on bond, conditioned that *Nathaniel Tolman* should continue a true prisoner in the custody of the jailer, &c. Issue was joined on the question of escape, and a verdict found for the

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plaintiff, subject to the opinion of the Court upon a case agreed, which was to the following effect: —

At the time alleged in the plaintiff's replication, the said *Nathaniel* was a prisoner in the jail at *Dedham*, at the suit of the plaintiff, and had given bond according to the statute, the defendant being his surety, conditioned to be a true prisoner until he should be thence lawfully discharged. On the 19th day of February, 1803, he was released from confinement, by taking the poor prisoner's oath. From the date of the said bond until so discharged, he slept and remained during the night time in the house of one *William Smith*, in which house all the other prisoners, who had given bond for the liberty of the yard, also passed the night. — In December, 1801, the Sessions passed the following order, *viz.*: "On verbal report of a committee, ordered that *William Smith's* east chamber be accepted for the present, as appurtenant to the jail, for accommodation of such debtors only as may give security for continuing true prisoners." — Afterwards, in September, 1802, the Sessions passed the following order, *viz.*: "Ordered that the whole of *William Smith's* house be considered as part of the jail, for such debtors only as shall have liberty of the yard, instead of one chamber, as heretofore." — The said house remained so appropriated by the Sessions for the purpose aforesaid until the said *Nathaniel* was discharged. During the said term, the rent of said house for the said use was paid by the county. During the said *Nathaniel's* confinement, the keeper of the jail exercised no control over said house, nor over the said *Nathaniel*, who was not in the county jail during that time, unless the said house should be considered part of the said jail.

* *Whiting* for the plaintiff. [* 162]

Morton, attorney-general, for the defendant.

By the Court. From the case stated we take it as agreed that *Smith's* house was situate within the boundaries of the jail-yard, as fixed and determined by the Court of Sessions; they had then authority to appropriate the whole house, or any apartments in it, for receiving and lodging prisoners for debt, having the owner's consent. It appears by the case that this was done here. The Sessions paid rent for the use of it, for the purpose of lodging prisoners for debt; and without a formal lease, the sheriff and his deputy jailer had full authority to enter the apartments so appropriated, in the same manner as they had to enter the jail itself, and to exercise the same control therein. Their neglecting to exercise such control could not operate to charge a prisoner with an escape, who duly kept within the limits and apartments prescribed. There was then no escape. The verdict must be set aside, and the defendant have judgment for his costs.

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WILLIAM H. SUMNER, Administrator, &c., *versus* THOMAS WILLIAMS AND JOSEPH WILLIAMS.

Administrators of an insolvent estate, under a license of court to sell the real estate of their intestate for the payment of his debts, sell an equity of redemption, of which their intestate was supposed to die seised, (the grantees at the same time purchasing an assignment of the mortgage;) and in their deed the administrators covenant, *in their said capacity of administrators*, that they, *as administrators*, are lawfully seised of the premises; that they are clear of all encumbrances, except the mortgage; that they have, *in their said capacity*, good right to sell, &c.; and that, *as administrators*, they will warrant and defend the same to the grantees and their heirs, &c., against the lawful claims of all persons; and they sign and seal the deed *as administrators*. — In an action against them upon the covenant to warrant, &c., after an eviction by a paramount title, it was holden that they were answerable personally on their covenant; and that the measure of damages was the consideration money and interest, with the costs that had arisen to the grantees in defending against the suit, by which they had been finally evicted; and not including the money paid for the assignment of the mortgage, nor for the release of dower by the intestate's widow.

THIS was an action of covenant broken, commenced against the defendants by *Elizabeth Sumner*, who dying during the pendency of the suit, the plaintiff, as administrator of her estate, was admitted to prosecute.

The declaration contains three counts. The *first* count sets forth, that the defendants, by their deed, dated April
[* 163] *9th, 1789, in consideration of £305 lawful money, did give, grant, and sell to *Increase Sumner*, Esquire, deceased, and to *Elizabeth Sumner*, the plaintiff, and the then wife of the said *Increase*, "certain tracts and parcels of land in *Roxbury*;" and in and by said deed, did recite, that the premises therein described were the same which *William Dudley* had conveyed to the said *Thomas Williams* in mortgage on the 6th of July, 1786, which the said *Thomas* had, on the said 9th of April, 1789, assigned to the said *Increase* and *Elizabeth*; and that the defendants, in and by their said deed, did covenant with the said *Increase* and *Elizabeth*, their heirs and assigns, that they, the said *Thomas* and *Joseph*, as administrators of the estate of the said *William Dudley*, were lawfully seised of the same tracts and parcels of land; that the same were free and clear of all encumbrances by them or with their knowledge made, excepting the said mortgage and bond, and *Sarah Dudley's* right of dower; and that they, the said *Thomas* and *Joseph*, as administrators of the said *William Dudley*, had good right to sell and convey the same tracts and parcels of land to the said *Increase* and

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Elizabeth, and that they would warrant and defend the same tracts and parcels of land to the said *Increase* and *Elizabeth*, their heirs and assigns, against the lawful claims and demands of all persons. — This count then alleges that the said *Increase* and *Elizabeth* entered on the same day; that the said *Increase* died June 9th, 1799; and that the said *Elizabeth* ought now to hold and enjoy the same tracts and parcels of land in fee, according to the said conveyance and covenants of the defendants. — But, protesting that the defendants, as administrators, &c., were not lawfully seised of said lands; that the same were not free of all encumbrances, &c.; and that the defendants had not good right to sell and convey the same to the said *Increase* and *Elizabeth*, — the plaintiff in fact says, that the defendants have not warranted and defended the said tracts and parcels of land to the said *Increase* and *Elizabeth* during the life of the said *Increase*, nor to the plaintiff since the death of * the said *Increase*, although requested, &c. For that [* 164] one *Joseph Dudley*, of, &c., had good and lawful right, as heir in tail of *William Dudley*, by virtue of the gift of one *Joseph Dudley*, deceased, and at the Supreme Judicial Court, October term, 1805, at *Dedham*, recovered judgment against the said *Elizabeth* for his seisin of the same land, with 32 dollars 44 cents costs, and by virtue of his writ of seisin, issued upon the same judgment, entered and evicted her therefrom, and still holds her out, &c., and that she has expended 2000 dollars in her defence against that suit; and so she says that the defendants have not kept their said covenants, but have broken the same, &c.

The *second* count is similar to the first, except that it alleges that the defendants by their deed did give, grant, and sell to the said *Increase* and *Elizabeth* "the equity of redemption" in said tracts and parcels of land, whereof *William Dudley* died seised and possessed, and did therein recite that the *premises* therein before described were the same which the said *William Dudley* conveyed to the said *Thomas Williams* by way of mortgage, &c., as in the first count. This count then states that the defendants, by their said deed, covenanted that they, as administrators, were seised of the same tracts and parcels of land; that the same were free of all encumbrances, excepting, &c., as in the first count; and that they would warrant and defend the same tracts and parcels of land to the said *Increase* and *Elizabeth*, &c., and concludes with like averments as the first count.

The *third* count is like the second, except that it alleges that the defendants covenanted that they, as administrators, were seised of *the premises*; that the same were free of all encumbrances, &c; that the defendants, in their said capacity, had good right to sell and

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convey *the same;* and that they would warrant and defend *the same*, &c. It then alleges the entry of the said *Increase* and *Elizabeth* into the *tenements aforesaid*, and the death of the said *Increase;* and protesting that the defendants were not seised of the *premises;* that *the same* were not free of all encumbrances,
[* **165**] * &c.; and that the defendants had not good right to sell and convey *the same*, &c.; — in fact, says that the defendants have not *warranted and defended the same*, &c.

In each of the three counts there is a profert, both of the deed of the defendants declared on, and of the said deed of the said *Thomas Williams* to the said *Increase* and *Elizabeth*.

The defendants plead several pleas in bar.

In the *first* plea, which is to the *first* count only in the declaration, the defendants pray oyer of the two deeds mentioned in the count.

By the first deed, the defendants, after reciting an application to the Court of Common Pleas for license to sell all the real estate of which *William Dudley*, deceased, insolvent, died seised in fee simple, a license pursuant thereto, and a sale at public auction, in their capacity of administrators of said estate, in consideration of £305, paid them as administrators, by *Increase Sumner* and *Elizabeth*, his wife, do give, grant, and sell unto the said *Increase* and *Elizabeth the equity of redemption*, of which *William Dudley*, aforesaid, died seised and possessed in the following described tracts or parcels of land in *Roxbury*, &c., (describing them and) reciting that they are the same which said *Dudley* conveyed to the said *Thomas Williams* on the sixth day of July, 1786, as a collateral security for the payment of a certain bond of the same date, which said *Thomas* had assigned to said *Increase* and *Elizabeth*, by his deed of even date with this instrument; — to have and to hold *the same* to them, &c., in fee: then follow the covenants in these words: "And we, *in our said capacity of administrators*, do covenant with the said *Increase* and *Elizabeth*, their heirs and assigns, that we, *as administrators as aforesaid*, are lawfully seised of *the premises;* that they are free and clear from all encumbrances by us or with our knowledge made, saving and excepting the mortgage deed and bond above referred to, and the right of dower which *Sarah Dudley* has a right to demand; that we have, in our said capacity, good right
[* **166**] * to sell and convey *the same* to the said *Increase* and *Elizabeth*, and, that *as administrators as aforesaid*, we will warrant and defend *the same* to the said *Increase* and *Elizabeth*, their heirs and assigns forever, against the lawful claims and demands of all persons. In testimony whereof, we, the said *Thomas Williams* and *Joseph Williams*, *in our said capacity of administrators*.

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have hereunto set our hands and seals this ninth day of April, seventeen hundred and eighty-nine. *Thomas Williams*, administrator on the estate of *William Dudley*. *Joseph Williams*, administrator on the estate of *William Dudley*."

The deed of *Thomas Williams* to *Increase* and *Elizabeth Sumner* recites a mortgage of the same land from *William Dudley* to the said *Thomas*, dated July 6, 1786, and a bond of the same date for the penal sum of £936, 6*s*. 6*d*., subject to the conditions in the same expressed. Then, in consideration of £542, 6*s*., the said *Thomas* gives, grants, bargains, assigns, and sets over to the said *Increase* and *Elizabeth* the said deed of mortgage and bond, with all his interest and estate in the same, and in the said lands, and the money thereon due; to have and to hold the same in fee; with covenants that the premises are free of encumbrances by him or with his knowledge made, (excepting a sale of the equity of redemption in the premises of which *William Dudley* died seised, which the grantor and *Joseph Williams* had made to the said *Increase* and *Elizabeth* on the same day,) that the moneys on the said bond are wholly due and unpaid, ("*saving and excepting the consideration the said* Increase *and* Elizabeth *have paid me for the said bond and mortgage, and which is by them and myself considered as part of the purchase money of the lands described above, and which, with the sale of the equity of redemption before referred to, is meant for a full consideration, and as a complete title to the same;*") with a further covenant to do no act invalidating the mortgage or bond, and a power to the said *Increase* and *Elizabeth* to do every thing necessary to complete to them a title to the premises. Dated the 9th of April, 1789.

* After oyer and protestations that the defendants [* **167**] made their said deed and all the said covenants as administrators, &c., and not in their private right or capacity, and that the estate and premises conveyed by their said deed were worth £308, and no more, the defendants plead that *William Dudley*, on the 6th of July, 1786, being seised and possessed of said lands, conveyed the same by way of mortgage, to said *Thomas Williams*, to secure the payment of £465, 3*s*. 3*d*., in one year, with interest; by force whereof the said *Thomas* became seised and possessed of the same lands in fee, subject to the equity of redemption of the said *William Dudley;* that on the 1st of November, 1786, the said *William Dudley* died seised as of fee, and possessed of the said equity of redemption, which is the same right in equity of redemption, and the whole of the estate and premises granted and conveyed by the defendants in and by their said deed; that the said *Thomas Williams*, on the 9th of April, 1789, did assign,

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grant, and convey said lands to said *Increase* and *Elizabeth*, subject to said equity of redemption, whereby they became seised in fee, subject to said equity; that thereupon the defendants, by their said deed, conveyed to said *Increase* and *Elizabeth* the said equity of redemption, which thereby became merged and extinguished, &c.

The plaintiff replies to this plea, that, when *William Dudley* made his said mortgage deed to the said *Thomas Williams*, he was not seised of the said lands in fee simple, but in fee tail male, by virtue of the gift of *Joseph Dudley* to him, the said *William*, and the heirs male, of his body; that the said *William* died, and thereupon the right descended to *Joseph Dudley*, his eldest son, who, as set forth in the declaration, entered, evicted, and removed the said *Elizabeth*, as he well and lawfully might, &c.

To this replication the defendants demur generally, and the plaintiff joins in demurrer.

The *second* plea is also to the first count only, and contains protestations that the said deed and covenants were [* **168**] *made by the defendants as administrators, &c., and not in their private right or capacity; and that the estate and premises by them conveyed were worth 1016 dollars 67 cents, and no more, and then alleges that the said *Joseph Dudley* did not evict the plaintiff of the said right of redemption, granted and conveyed in and by their said deed; and it concludes to the country.

To this plea the plaintiff demurs specially, and assigns the following causes of demurrer: —

1st. That the defendants, by the plea aforesaid, endeavor to draw and submit to the jury the construction of the deeds in the same plea mentioned, which is matter of law only, for the consideration of the Court, and not of the jury.

2d. That the same plea contains matter of law only, which cannot be submitted to the jury.

3d. That the said *Thomas* and *Joseph* have not in their said plea denied or traversed any fact alleged in said first count, but have tendered for the jury an issue upon an inference of law only, and not on any fact alleged in said first count.

4th. That as the said *Thomas* and *Joseph*, by their said plea, attempt to put in issue a matter not alleged in said count, and not any fact or point therein alleged, they ought to have concluded the same plea with a verification, and not to the country.

The defendants join in demurrer.

The *third* plea is to the second count, and is, with the replication, demurrer, and joinder, substantially the same with the first plea to the first count.

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The *fourth plea*, which is also to the second count, is, with the demurrer, causes of demurrer and joinder, similar to the second plea to the first count.

The *fifth* and *sixth* pleas are to the third count, and, with the replication, demurrers, causes of demurrer, and joinders, like the first and second pleas to the second count.

*The *seventh* plea, which is to all the counts in the [*169] declaration, protesting as in the second plea, avers that the said deed and covenants were made by the defendants as administrators, &c., and not in their private right or capacity, and concludes with a verification.

To this plea the plaintiff demurs, and shows the following causes of demurrer: —

1st. That the plea contains no certain issuable point or fact, upon which an issue can be taken to the jury.

2d. That the defendants in the same plea endeavor to draw and submit to the jury the construction of the deed in the same plea mentioned, which is matter of law only, and for the consideration of the Court only, and not for the jury.

3d. That the same plea contains matter of law, which cannot be submitted to the jury.

The defendants join in the demurrer.

The *eighth* plea is to the first count, and, after the same protestations as are in the seventh plea, avers that the defendants did not, by their said deed, grant and convey to the said *Increase* and *Elizabeth* the said tracts and parcels of land, as the plaintiff in her said first count alleged; and it concludes with a verification.

To this plea the plaintiff demurs, and assigns the same causes as on the demurrer to the last plea; and the defendants join in demurrer.

The *ninth* plea is also to the first count, and reciting that oyer has been had of the deeds, and protesting as before, and also that the defendants, by their said deed, granted the said equity of redemption only, alleges that the defendants, in and by their said deed, did not covenant to warrant and defend the said tracts and parcels of land, &c., and concludes with a verification.

To this plea there is a demurrer, assigning the same causes as on that to the seventh plea, and a joinder in demurrer.

*The *tenth* plea is to the second count in the declara- [*170] tion, and contains the same recitals, protestations, and averments, as the preceding plea. The plaintiff demurs to it for the same causes, and the defendants join in demurrer.

The *eleventh* plea is to the third count, and is similar to the first and third pleas, until it comes to the material averments in the con-

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clusion, when it states that the equity of redemption, of which *William Dudley* died seised, was all that was granted or intended to be granted by the defendants, in and by their said deed, and that the said *Joseph Dudley*, the younger, did not, in his said suit, claim or demand the said equity of redemption, nor did he evict the plaintiff thereof; and it concludes with a verification.

To this plea there is a replication similar to the replication to the first plea in bar, and a like demurrer and joinder.

The cause was argued at great length at the last October term in this county, and afterwards in *Middlesex*, by *Dexter* and *Prescott* for the plaintiff, and *Amory*, *Bigelow*, and *Jackson*, for defendants.

As there was a final difference of opinion on the bench, and each of the justices went fully into the consideration of the questions discussed at the bar, and of the arguments on which he grounded his opinion, citing the authorities, it will be unnecessary to recite the reasoning of the counsel, further than to observe that the arguments on both sides went principally to the merits of the great question in the cause, *viz.*, the personal liability of the defendants upon the covenants contained in their deed, rather than any technical reasonings upon the voluminous pleadings in the case. Indeed it seemed to be conceded that a general demurrer to the declaration, after oyer of the deed on which the action was brought, and of the assignment by *Thomas Williams* of *William Dudley's* mortgage, would have sufficiently exhibited to the Court the whole ground on either side.

After the argument, the action stood continued for
[*171] advisement *to this term; and now the justices present delivered their opinions *seriatim* as follows: —

SEDGWICK, J. The facts, which, in my opinion, are necessary to be considered in the decision of this cause, are the following: —

On the sixth day of July, 1786, *William Dudley*, being seised in *fee tail* of certain lands in *Roxbury*, mortgaged them in *fee simple* to *Thomas Williams*, one of the defendants.

On the first day of November, 1786, *William Dudley* died, and thereupon administration on his estate was granted to the present defendants.

After the granting of the administration, and before making the deed declared on, the defendants, obtained from the Court of Common Pleas a license to sell all the real estate of which *William Dudley* died seised.

On the ninth day of April, 1789, *Thomas Williams*, for a valuable consideration, assigned to Governor *Sumner* and his wife, who was the original plaintiff in this action, all his right, by virtue of the

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deed of mortgage. Governor *Sumner* died before the commencement of the action.

On the same ninth of April, the defendants, having observed all the requirements of law in that regard, sold the equity of redemption, which *William Dudley* had in the mortgaged premises, to Governor *Sumner* and wife, and made a deed thereof to them, therein styling themselves "*administrators of all and singular the goods and chattels, rights and credits of* William Dudley, *late of* Roxbury." After premising that they had petitioned the Court of Common Pleas of the county of *Suffolk*, to obtain license to sell all the real estate of which *Dudley* died seised in fee simple; that such license had been accordingly granted; that they had advertised the same according to law; and that the grantees, Governor *Sumner* and wife, had become the purchasers, by being the highest bidders at auction, — the deed then proceeds, that they, the said *Thomas Williams* and *Joseph Williams*, "*in their capacity of administrators* * *on the estate of William Dudley*," in consideration [* 172] of £305, paid to them, *as administrators as aforesaid*, by the grantees, had, *in their said capacity*, given, granted, &c., and thereby did give, grant, &c., *the equity of redemption, of which the said* William Dudley *died seised and possessed in the premises*, which are described; and the more particularly to specify what was intended to be sold, that is, the equity of redemption and nothing else, the mortgage from *Dudley to Williams*, and *his* assignment thereof to the grantees, are particularly set forth. The *habendum* is in these words: — "To have and to hold *the same* to the said *Increase* and *Elizabeth*, their heirs and assigns, to their use and behoof forever." The grantors then covenant, *in their said capacity of administrators*, with the grantees, that they, *as administrators as aforesaid*, are lawfully seised *of the premises*; that *they* are free and clear from all encumbrances, by them or with their knowledge made, *saving and excepting the mortgage deed and bond above referred to, and the right of dower of* William Dudley's *widow*; they also covenant, that they had, *in their said capacity*, good right to sell and convey *the same* to the grantees, and that they, *as administrators as aforesaid*, would warrant and defend *the same* against the lawful claims and demands of all persons; and they subscribed their names, each as administrator on the estate of *William Dudley*, and annexed seals expressly *as administrators*.

After the death of *William Dudley*, and after the death of Governor *Sumner*, *Joseph Dudley*, the son and heir of *William*, commenced an action of *formedon in descender* against the original plaintiff, *Elizabeth Sumner*, and recovered judgment against her whereby she was evicted.

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The great question in this case is, — whether the defendants are bound by the covenants in their deed, in their *private* capacities. — But, previous to the discussion of that question, I will endeavor to ascertain (and it is important that it should be ascertained) what was intended as the subject of the grant. And here I [* 173] will observe, that it *seems to me, that the mind of every man capable of comprehending the subject, unshackled by speculative and abstract reasoning, who should endeavor, from the plain and settled signification of the words, to discover the meaning of the parties, would feel perfect satisfaction in the conclusion, that it was intended to sell the equity, which *William Dudley* had, of redeeming the mortgaged premises, and nothing more. Great, and, I think, unusual attention is paid in the *language* of the deed, that no doubt should remain upon this question.

In the premises, to exclude all pretension to their having any claim to *the land*, and to confine their claim merely to *the equity of redemption*, they particularly state the mortgage; that it was outstanding, and had that day been assigned to the grantees; thereby showing that they had no right to sell *the land*. The subject of the grant is the "equity of redemption, of which *William Dudley* died seised in the *premises*." The *habendum* is expressed, to have and to hold *the same*.

Here commences the argument of the counsel for the plaintiff. — They say that the defendants, in expressing the subject of the grant, call it "the equity of redemption, of which *William Dudley* died seised;" and that, by adding "in the premises," they have distinguished that *subject* from the *premises*; and then they go on to show that "the *premises* can refer to nothing but *the land* described."

Having ascertained this, they then proceed further to show from it, that *the subject* of the defendant's covenant is *the land*, and not *the equity of redemption*. They say that the word *same*, in the *habendum*, refers to premises, as the next antecedent; but that, if they are mistaken in this, the covenant of *seisin*, that they were lawfully seised of *the premises*, and their reference thereto in the subsequent covenants, by the word *same*, renders it manifest that it was intended that the covenants should go to *the land*, and not be confined to *the equity of redemption*; that it is a good rule of construction, that where, in an instrument, a word [* 174] *or expression has a definite meaning annexed to it, and it again recurs in the same instrument, it is fairly to be presumed (unless it can be clearly inferred, from the subject matter or context, that a different meaning was intended) that it is used in the same sense; that the subject of the grant is the *equity*

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of redemption to the premises; that the *equity* is a distinct subject from the *premises*; that the *premises* and the *land* are the same; and that the covenants refer to the *premises*, and of consequence to the *land*. This I take to be the substance of the argument in this regard; but I am not satisfied with its justness.

A strict, literal, and grammatical construction of an instrument, in its *various parts*, taken separately, would sometimes be absurd, sometimes contradictory, and frequently unjust, because against the manifest intention of the parties. But a liberal consideration is to be had of *the whole* instrument, in relation to the subject matter, to discover what was the true intention of the parties.

The technical meaning of the word *premises*, in a deed of conveyance, is every thing which precedes the *habendum*. (1) In this case the word "premises" first occurs in the *premises* of the deed. The office of an *habendum* is to name the grantee, and limit the certainty of the estate in the subject of the grant. (2) The word *premises*, where first used, means undoubtedly *the land*, the equity of redeeming which was sold. But I think the word *same*, used in the *habendum*, the word *premises*, used in the first covenant, and the word *same*, used in the other covenants, all mean the same thing, *viz.*, the subject of the grant.

The grant is of an *equity of redemption*, in certain described *lands*, and the *habendum* is to have and hold the *same*. Does the word *same* here refer to the land, in which was the equity of redemption, or to the equity of redemption? I am perfectly satisfied, to the latter only. The estate in the *land*, and that in the *equity of redemption*, might be, and were, holden separately; they were not, nor * could they be holden together. The [* 175] moment they should be united, that moment the equity of redemption would cease to exist. There can be no possible motive that the *habendum* should mean the *land*. It would not in that case execute its proper use; which is to limit the certainty of the estates in the thing granted. With the lands, the administrators, as such, had nothing to do. They undertook to sell the *equity*, and it was proper, and in such a case is usual, that there should be an *habendum*, and that it should refer to the subject of the grant. Besides, it is proper, when it can be done, consistently with the words of a deed, that it should be so construed, that all parts may have effect; but if this *habendum* is construed to refer to the land, it will be wholly inoperative. An *habendum* cannot operate as a grant or conveyance.

(1) *Co. Lit.* 6, 7. — 2 *Co.* 55. — 11 *Co.* 51. — *Plowd.* 196. — *Shep. Touch.* 75.
(2) *Co. Lit.* 6, *a.* — 9 *Co.* 47, *b.* — *Com. Dig. Fait. E.* 9.

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Let this case be illustrated by one analogous. Should there be a grant of one acre, parcel of one hundred acres, particularly described, and the *habendum*, instead of expressing the granted premises, should say, as in this case, "to have and to hold the *same*," no one will suppose that such an *habendum* should be construed to refer to the hundred acres; and yet such a case would differ nothing, in principle, from the present. The one would regard the *quantity;* the other regards the *quality*. And it may be added, that there can be no possible motive suggested, why the *land*, which was not the subject of the grant, should be the subject of the *habendum*, while the *equity of redemption*, the real subject of the grant, should be wholly disregarded by the *habendum*.

The covenants, as meaning to attach only to the equity of redemption, are, in my opinion, equally explicable. In the construction of doubtful or ambiguous words or expressions, it is our duty to refer them to the subjects, respectively, to which they properly belong, so as to carry into effect the true intention of the authors of them.

The first covenant is, that the defendants, in their capacity of administrators, are lawfully seised of the *premises;* [* 176] *and the other three covenants make use of the word *same*, in manifest reference to the word *premises;* so that, if the word *premises*, in the first covenant, means the *equity of redemption*, and nothing more, then it does not mean the *land*. It has already been observed, that the premises of a deed of conveyance comprehend every thing which precedes the *habendum*. In this case they included the parties, the capacity of the grantors, the application to the Court of Common Pleas for license to sell, the obtaining that license, the advertising of the sale, the sale itself, the grant and the subject of it, *the equity of redemption*, and the land, in relation to which the equity of redemption existed; — all these are *premises*. But did the word *premises*, used in the covenant, mean all these? The supposition is absurd and ridiculous. To what, then, was it intended to be referred? By a just application of the rule already mentioned, — by referring the word "*premises*" to the subject to which it properly belongs, — there will, I apprehend, be no difficulty in determining what the parties intended. They intended that the words should have an effect; and this they could not, unless they related to the equity of redemption.

Concomitantly with the transaction now under consideration, that is, on the same day, Governor *Sumner* purchased of *Thomas Williams* a mortgage, which had been previously made by *William Dudley*, of the land in question, and took an assignment of it to himself and his wife. In the deed of assignment, the deed, on which this

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action is brought, is expressly referred to. The assignment of the mortgage vested the fee in the land in the grantees; but in that assignment one of the defendants had nothing to do, nor had the other in his capacity of administrator. Can we then believe that the covenants of the administrators were intended to relate to the land, with which they had nothing to do, but as connected with the equity of redemption? We know that the word *premises*, in the *covenant*, could not be intended to comprehend all that are properly *premises* * in the deed. How, then, [* 177] shall it be restrained, and to what shall it be made to relate? I answer, to that which we can collect to have been the intention of the parties; and I have no doubt, that was the *equity of redemption*, and nothing more. And besides, it would be a most absurd transaction for the defendants to undertake to covenant about that which the deed itself showed they had no interest in, while the covenants had no relation to the subject of the grant. I have thought it proper to prove that the subject of the deed, in all its parts, was the equity of redemption; because that shows that the defendants mean to act in conformity to legal authority.

It is proper also to observe, that, in this case, the license granted by the Court of Common Pleas to the defendants, to sell the real estate, of which *William Dudley* died seised, authorized them to sell the equity of redemption; for the mortgage by *William Dudley* to *Thomas Williams* operated a discontinuance of the estate tail; the consequence of which was, that *Williams* became seised in fee of the mortgaged premises, and *Dudley* became seised, and died seised, of the equity of redemption; and these different rights, so acquired, were good against all the world, but the heir in tail. (3)

The deed of *Dudley* to *Williams* in fee simple gave a correspondent seisin; so that on the death of *Dudley*, the heir in tail was driven to his *formedon in descender*. For the statute *de donis* (in conformity to the established rule of the common law, that whenever any person acquired a presumptive right of possession, his possession was not to be defeated by entry, however slender or unlawful the title of the grantor might be) did not absolutely nullify the alienations of the donee in tail, but enabled the issue to defeat them by his *formedon in descender*. The alienation of *Dudley*, then, conveying a fee simple to *Williams*, operated a discontinuance. This fee simple had, depending upon it, an equity of redemption, of which *Dudley* died seised; and such equity of redemption has always been considered * as subject to be [* 178]

(3) *Lit.* § 620. — *Co. Lit.* 325, *and note* 281, *to Co. Lit.* 326, *b.*

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sold by virtue of a license obtained to sell the real estate of a person deceased.

These propositions then, in my judgment, are proved: 1. That *William Dudley* died seised of an equity of redemption. — 2. That the defendants were authorized to sell that equity of redemption. — 3. That by the deed, on which the action is brought, they sold that equity of redemption, and nothing more. — And, 4. That all the covenants of that deed relate to the subject of the grant, the equity of redemption, and to nothing else. (*a*)

I now proceed to consider, what I have always thought the great, and indeed the only important question in the case: — whether the defendants are bound by their deed in their *private* capacities? And I am, after the fullest consideration I have been able to give to the case, satisfied, both on principle and on authority, that the covenants cannot be considered as *personal*, and therefore that judgment ought to be rendered for the defendants.

In every contract the intention of the parties is to be carried into effect. A contract is an agreement between two or more, concerning something to be done, whereby the parties are bound mutually to each other, or one is bound to the other. In this definition, which is plain, simple, intelligible, and founded on the eternal and immutable principles of justice, all authors of respectability, whom I have had an opportunity of consulting, in substance agree. This implies understanding and consent. And that a contract, in whatever terms it may be expressed, cannot be carried *beyond* the intent of the parties *at the time of entering into it*, is clear from the nature of its constitution; one essential ingredient being, that it is entered into freely, of the parties' own accord. (4) And from hence it follows, that no man can be called upon to perform an alleged contract, which has not received his previous assent. If the performance of a contract be demanded against a man, and he can truly say, *Non in hæc fœdera veni*, — I have never assented to [* 179] any such contract, — he must be discharged; and *I dare venture to affirm that there is no case, in any civilized country, where a man has been holden to respond in damages for the non-performance of a contract, unless he had violated stipulations to which he had previously *assented*. In this case the allegation is, that the defendants have entered into stipulations in their *private* capacities; and if they have not, the plaintiff cannot recover.

(*a*) [*Comstock* vs. *Smith*, 13 *Pick.* 116. — *Allen* vs. *Seyward*, 5 *Greenl.* 227. — *Jackson* vs. *Winslow*, 9 *Cow.* 13. — ED.]

(4) 1 *Powell on Contracts*, 371.

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That the defendants intended to contract in their capacities of *administrators*, and not in their *private* capacities, is to my mind most evident; — 1. From the words of the instrument themselves, and, 2. From the nature of the transaction.

1. They commence the deed by announcing the character in which they acted, — *as administrators;* in that capacity they receive the consideration money; in the same capacity they make the grant; they repeat, at the commencement of each of the four covenants, that they act in that *capacity;* each adds to the signature of his name, that it is done as *administrator on the estate of* William Dudley; and, lastly, they affix seals, not in their *private* capacity, but in their capacity of *administrators*. No argument could, in my mind, add to the satisfaction, with which I infer from these facts, that it was perfectly understood at the time of the contract, that the defendants acted in their capacity of *administrators*, and not in their *private* capacities.

2. Were the words doubtful or ambiguous, I should, from the nature of the transaction, feel strengthened in the same conclusion. The defendants could act with effect in their character of *administrators;* while in their private capacities, neither could they sell, nor could the grantees take. It is reasonable to suppose, that, throughout the same instrument and transaction, they should act in the same character. There is no reason, nor could there have been any motive, for their assuming on themselves the responsibility of the soundness of the title which they were selling. They had no consideration for this; for the consideration money, which they received, was assets in their hands, for the benefit of *Dudley's* creditors.

*On the whole, from the instrument, and the nature [* 180] of the transaction, we may safely conclude, that it was as well understood by the parties, that the defendants were not to be responsible, in their private capacities, upon the covenants, as if words to that effect had been inserted in the deed.

But it is said, that the covenants in the deed cannot be considered as the covenants of administrators; because administrators, as such, could not enter into such covenants, and bind by them the estate which they represented; and therefore that these covenants must be considered as binding the covenantors in their natural capacities, *ut res magis valeat quam pereat.*

Admit, however, that the covenants do not bind the estate of the intestate; it does not follow, to my mind, that they ought to be so construed, as to bind the defendants in their natural capacities. Suppose that an administrator should undertake, in that capacity, to contract upon a subject, on which the law does not authorize him

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to contract, but in which he has no personal interest; and that at the time of the contract he should expressly declare to the other party, that he was distinctly to understand, that in no event he was to be personally responsible; he could not certainly be rendered so by law. Yet such an express declaration would not communicate the *meaning of the parties* with more clearness and certainty, than it is done by the various and repeated expressions in this deed, of the *capacity*, in which the defendants undertook the contract. If the defendants undertook to contract on a subject, upon which they by law had no power to contract; and they expressly, or by necessary and inevitable implication, exclude all idea of personal responsibility; and the extent of their authority is equally known to both parties; it seems to me much more reasonable, that their acts should be considered void, than that they should be deemed to compose a contract totally different from the intentions of the parties. In any event, therefore, whether it was, or was not compe-
[* 181] tent * for the defendants to covenant *as administrators*, so as to bind the estate which they represented, I think that they are not bound in their *natural* capacities; because it certainly was not intended by the contract that they should be.

But I do think that, by the statute, administrators, authorized by a license of court to sell the real estate of their intestates, may, by covenants, bind the estate which they represent, to respond for the unsoundness of the title.

By the common law, an administrator can in no case sell the real estate of his intestate; and all the authority, which he has for that purpose, is derived from the statutes. The legislature might have authorized an administrator, upon a sale of the real estate of his intestate, to enter into the usual covenants to indemnify against a failure of title; and it is reasonable that it should be done; for it will frequently enable him to sell for a better price. Where estates are not insolvent, the sale is only of part; and why should not the residue be holden to make good a failure of title? And even where the whole is sold, upon an *apparent* insolvency, other effects may afterwards accrue or be discovered; and I know no reason why they also should not be holden. The only question in this regard is, whether, by a just construction of the statute, a power so to covenant is given.

The authority given to executors and administrators to make deeds is expressed in very general terms. They are empowered to "make good and sufficient deeds of conveyance." What is a good and sufficient deed of conveyance? — There ought to be a liberal construction of an act, made for such equitable and beneficial purposes, as that under consideration. Now, when a man undertakes

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to make "a good and sufficient deed" of his real estate, ought it not to be understood, not only that it shall be good and sufficient to *convey*, but also to *secure* by the usual covenants against a defect of title? And why should not the same expression in the act receive the same construction? I see nothing absurd, inconsistent, or unreasonable, in giving such *a power; and [* 182] the exercise of it would, I am persuaded, in many instances, enable an executor or administrator to sell on better terms.

That an executor or administrator might reasonably, in the opinion of the legislature, be authorized to enter into covenants in a deed of conveyance of the estate of a deceased testator or intestate, is apparent from the fourth section of the act, (5) by which, in cases where executors and administrators are to make deeds of conveyance, in performance of the contracts of their testator or intestate, it is provided that the executors or administrators shall "make and execute *such* conveyance or conveyances, to the persons contracted with, as it shall appear the said obligor, covenantor, or contractor would, by his bond, covenant or contract, be obliged to make and execute," if he were living. Now, if, by the contract to be executed by the executor or administrator, the testator or intestate was bound to make a deed of conveyance with the usual covenants, a *like* deed must be made, or it would not be *such* conveyance as the testator or intestate "was obliged to make." And I think that "good and sufficient deed," in the other instance, *implies* what is *expressed* in this.

But it is said, that the defendants have expressly bound themselves, their executors and administrators, and that their executors or administrators, as such, will have nothing to do with the estate of *William Dudley*. But, I ask, how have they bound themselves, their executors and administrators? The answer is, As administrators on the estate of *William Dudley*. And what, according to the good sense and justice of the case, and the intention of the parties, was the meaning? Obviously, in my opinion, that themselves, as such administrators, and that whoever after them should represent the estate, should be responsible upon the covenants. They covenant *as administrators*, and these covenants are accepted by the grantees; yet it is now said, in behalf of these latter, that instead of being the covenants of the administrators, they are the covenants of the defendants in their private capacities.

*Courts of justice have discovered a laudable zeal in [* 183] conforming to the meaning of the parties, in the construction of contracts. If they can clearly discern what that is, and

(5) *Stat.* 1783, *c.* 32.

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its purpose is lawful, they will, in all cases, carry it into effect; and to that end they will supply words, transpose them, or consider them merely as surplusage. — Innumerable cases might be cited, to prove and illustrate these propositions. — I will, however, mention but one — that of *Griffith* vs. *Goodland*. (6) The defendant covenanted with the plaintiff, his executors, &c., *valeant et possint habere* seven parts of all the grains made in the defendant's brewhouse for a certain term. The breach assigned was, that the defendant had, with intent to deceive the plaintiff, put divers quantities of hops into the malt, of which the grains were made, by reason whereof they were spoiled. After verdict for the plaintiff, there was a motion in arrest of judgment; but judgment was given for the plaintiff; because "the intention of the parties is to be considered in all contracts, and it was the intent of the parties here, that the plaintiff should have the grains for the use of his cattle, and they will not eat them, when hops are put into them." Here the maxim of good sense and experience, *qui hæret in literâ, hæret in cortice*, was properly applied. It was not pretended that the defendant had not *literally* performed his contract. The breach of the covenant was putting the hops into the malt, and yet the defendant had not covenanted that he would not do this; but the court apply their knowledge of the subject, by their good sense. They knew that the grains were *intended* for the use of the plaintiff's cattle, and thence they concluded that mixing the hops with the malt, which had frustrated that use, was against the spirit of the contract, and therefore a breach of the covenant.

It is the business of courts of justice, in cases of contract, first to discover their meaning, and then to compel their execution, or to give satisfaction for the breach of them. On the other [* 184] hand, it is emphatically true, that * courts will never make contracts for the parties; nor, because they discern that a contract, according to its true meaning, has no legal validity, or in effect will be inoperative, will they, to give it operation, suppose a meaning, which they are sure the parties never intended. Here lies the main strength of the argument for the plaintiff; that if the covenants in this deed are to be construed merely as the covenants of administrators, they will be inoperative and ineffectual, in an event where the parties intended they should have an effect. What then? Are we, because, according to the true meaning of the contract, the plaintiff has no remedy, to suppose a contract, which we know the parties never contemplated, to give a remedy against administrators, who have acted honestly in the exe-

(6) *Sir T. Raym.* 464.

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cution of their trust? Very different from this was the disposition of the court in the case of *Noble* vs. *King & Al.* (7) where the court refused to give the plaintiff leave to amend his declaration, on the ground that they would not interfere to assist him in an action brought against executors in their own right, who appeared only to have acted in the disposition of the testator's effects.

I have no doubt that agents, and executors, and administrators, acting as such, may bind themselves *personally* by their contracts; but then the reverse of this case must clearly appear, *viz.*, that they intended to bind themselves *personally*. In the case of *Macbeath* vs. *Haldiman*,(8) the words of the defendant's letters were sufficient to have rendered him liable. They authorized and required the plaintiff to furnish the supplies, for which the action was brought; but it appearing that he acted as a commanding officer, and that the supplies were for the use of the public, it was determined that the action could not be maintained. *Ashurst*, J., said the question must be, what was the meaning of the parties at the time of entering into the contract? He said, that a person acting in the capacity of an agent may undoubtedly contract in such a manner, as to make himself personally liable; and that brought it to the true question here, namely, whether, from any [* 185] thing which passed between the parties at the time, it was understood by them, that the plaintiff was to rely on the personal security of the defendant. And Lord *Mansfield* observed that the only question before the court was, whether the defendant was liable or not in that action. If he was, the plaintiff must recover; if not, no consideration respecting the plaintiff's remedy against any other party could induce the court to make him so. This case proves that whether there be or be not a remedy against another, cannot be taken into consideration, and that the only question, in a contract, is, what was the meaning of the parties; and the case compares in all respects with that under consideration, so as to comprehend the whole ground, on which it ought to be determined.

In the case of *Unwin* vs. *Wolseley*, (9) the defendant by his deed entered into covenant, by which he agreed, *on account of the king*, to do certain things, and that the government should be answerable for a certain sum of money in a certain event. The defendant, in the beginning of the deed, styles himself "senior officer of his majesty's ships and vessels at *St. Helena*." It does not appear from the case, that he had any authority, except what resulted from his situation as naval commander at that station, to enter into the contract on behalf of the government; nor was it pretended that

(7) 1 *H. Black.* 36. (8) 1 *D. & E.* 172. (9) 1 *D. & E.* 674.

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the plaintiff had any other remedy to enforce justice; yet the court determined that the action could not be supported, because the defendant *meant* to contract *as the servant of government*, and not to bind himself personally. *There* the defendant covenanted "on account of the king;" *here* the defendants covenanted "as administrators." By what ingenuity can we discern a distinction, which shall exempt from personal responsibility in the one case, and bind in the other?

The case of *Hodgson* vs. *Dexter*, in the Supreme Court of the United States, (10) was decided on the same principles. [* 186] The action was on an indenture of lease. It does * not appear by the deed for what purpose the lease was made; but by the defendant's plea it appears that it was made for the use of the war department, of which Mr. *Dexter* was then secretary. The lease is made to "*Samuel Dexter* and his successors;" and in the premises Mr. *Dexter* styles himself "secretary of war;" and in the several covenants he binds *himself* and his "successors." The court determined that the action could not be maintained; and, after stating the circumstances under which the lease was made, they say that the intent of the officer to bind himself personally must be very apparent indeed, to induce such a construction of the contract.

And in the case of *Brown* vs. *Austin*, (11) this Court unanimously came to a like decision; and does not the reason, on which these cases were decided, apply as strongly in the case of an administrator, acting in *autre droit*, as in that of a public agent?

There is not one of the cases which have been cited, where the plaintiff had a legal remedy, unless the contract was construed to bind the defendant personally. That circumstance therefore, in the case before us, is no reason why covenants should be construed as *personal*. If, in this case, it be true that the defendants could not, as administrators, bind those who might succeed them in the administration of the estate of their intestate, neither could Mr. *Dexter* bind his successors. The incapacity, then, of the defendants, to render valid what they undertook to do, is no good reason why their covenants should, against their manifest intention, be construed as *personal*.

After all, we must come back to the true question, — Did the defendants intend to contract in their natural capacity? Were they so understood, at the time of the transaction, by the grantees? I can hardly imagine any language, by which they could more clearly have expressed their meaning to contract exclusively in their

(10) 1 *Cranch*, 345. (11) 1 *Mass. Rep.* 208.

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capacity of administrators. In the commencement of the deed they announce the character in which they mean to be understood *as acting; and indeed but as administrators [* 187] they had no capacity of acting with effect, for the purpose which they undertook. In all their covenants, they declare that they assume the obligation which they import, as administrators; they complete the instrument by their signatures as administors; and as administrators they affix seals. There was no consideration, why they should render themselves personally liable upon their covenants; no reason has been suggested, and it is believed none can be, why they should assume so dangerous a responsibility; and hence I conclude that such was not the meaning of the parties.

There are cases, in which the covenants have been adjudged void, because they were made without consideration; and a performance of them would be unreasonable. I will cite one case to this effect, because it is in principle analogous to that under consideration. I refer to the case of *Frontin* vs. *Small*. (12) It was an action of covenant. The plaintiff declared, that whereas, by a writing of agreement, made between herself, attorney to *James Frontin*, of the one part, and the defendant, of the other, she, as attorney to *James Frontin*, demised to the defendant a house for years; and that the defendant, *for himself, his heirs, executors, and administrators*, covenanted that he would pay a certain rent to *James Frontin*; for the non-payment of which the action was brought. The court determined, 1. on the authority of *Combe's* case, (13) that if an attorney has a power, by writing, to make leases by indenture for years, &c., he cannot make an indenture in his own name, but must do it in the name of his principal; and therefore that it appeared, upon the face of the declaration, that the lease was void; and, 2. that the lease being void, *it followed as a consequence*, that the covenant to pay the rent was void also, and that the plaintiff could not maintain the action.

This reasoning is the plain dictate of common sense and justice; and it is not stronger than the case under consideration, * which is an attempt to render the defend- [* 188] ants liable upon a contract for the performance of obligations, which we know they never assumed.

Although it is generally true that a deed imports a consideration, yet, if, from the deed itself, it appears there was no *sufficient* consideration, the maxim of *nudum pactum, ex quo non oritur actio* applies, as well in cases of specialties as of other contracts. This appears from the case of *Frontin* vs. *Small*, which I have just cited. There

(12) *L. Raym.* 1418. *Strange*, 705, *S. C.* (13) *Mo.* 70, *pl.* 191.—9 *Co.* 77.

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the lease was the consideration of the covenant to pay; and because the lease was void, the court said that it followed, *as a consequence*, that the covenant to pay was void also. And in the case of *Rann & Al., exrs.*, vs. *Hughes, Admx.*, (14) in the House of Lords, Lord Chief Baron *Skinner*, in delivering the opinion of the judges, said, "It is undoubtedly true that every man is, by the law of nature, bound to fulfil his engagements. It is equally true, that the law of this country supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration; such an agreement is *nudum pactum, ex quo non oritur actio.*" Here the position taken is in the most general terms, that an agreement made without sufficient consideration is, by our law, *nudum pactum, ex quo non oritur actio;* and although, if it be by deed, the mere want of consideration cannot be averred and proved, to defeat the action, yet if it appear on the face of the deed, as in the case of *Frontin* vs. *Small*, no action can be supported.

In the case of *Rann* vs. *Hughes*, before cited, it was the opinion of the judges, that the consideration must be coextensive with the promise, to render it binding, so as to make an administrator liable *de bonis propriis.*

In the case of *Pearson & Al., Assignees*, vs. *Henry, Admr.*, (15) it was determined that the promise by an administrator to pay the debts of the intestate, if there be no assets, is *nudum pactum.*

Let these principles be applied to the case before us.

[* 189] *The defendants, as administrators, being authorized to sell, as such, make the deed under consideration. There was not a circumstance known to them, that was concealed from the purchasers. Not a farthing of the purchase money was retained to the use of the defendants. They had no personal interest whatever. They neither gained nor lost by the soundness or unsoundness of the title of their intestate; — and all this appears on the face of the deed. Where, then, can be discerned the sufficient consideration, which ought to bind them to respond, with their own property, upon these covenants? — Every thing relative to the contract is apparent on the face of the deed; and from it, it is clear that there is no legal or equitable consideration, to substantiate the claim made on the part of the plaintiff.

But it is said to be a general principle, that when a man undertakes to act on an authority, which he does not possess, he shall, in a contract made upon that basis, be answerable in his private capacity. And the principle is a reasonable one, inasmuch as the assumption is in itself a breach of the contract. This principle

(14) 7 *D. & E.* 350, *in notis.* (15) 5 *D. & E.* 6

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governs that class of cases, where executors, administrators, and others contract nominally in those characters, in instances not authorized by law. Thus, if *A*, as the agent of *B*, promise *C*, when in fact he is not *B*'s agent, we all feel that, for the falsity and deception, he ought to be responsible in his private capacity.

That, however, was not the case here. The defendants declared no falsehood; they practised no deception; they did not undertake to act on an authority they did not possess. On the contrary, they possessed the authority which they assumed; which was, to sell the equity of redemption; and both parties thought that the administrators might, in virtue of that authority, enter into the covenants which they did, *in their capacity of administrators.* That this is a true representation, no reasonable mind can doubt. If there was a mistake of the legal powers of the administrators, it was equally the mistake of both parties; and can it *be right, [* 190] that one should derive a benefit and the other suffer an immense loss from it? The parties were *in pari conditione*, and the rule then is, *melior est conditio possidentis.* There is no reason, why one should be relieved at the expense of the other.

I will now consider these cases, which have, upon a pretty laborious and extensive research, appeared to me to afford the most plausible arguments in support of the plaintiff's demand.

The case of promissory notes, when passing to and through the hands of executors and administrators, has been thought to afford a ground of argument, in this case, in favor of the plaintiff. The law seems to be settled, that if a note be assigned to an executor or administrator, *as such*, that he can maintain an action upon it *in that capacity;* but if it be endorsed by one *as executor or administrator*, the endorsee may maintain an action against him in his *private* capacity; and hence it is said that, in this instance, the contracting as executor or administrator will not screen a person from being responsible in his private capacity. The position is true; but *here*, on one hand, it produces no inconvenience or risk; and on the other, it is a necessary part of the system of negotiable securities.

It produces no inconvenience, and exposes to no risk. When an executor holds a promissory note, if it truly represents cash, he may convert it into money. If he assigns it, and the endorsee, in failure of payment, recurs to the executor, he has nothing to do, but to exchange the money, which he has received, for the note he has assigned. In such a case, without loss, every thing is reinstated as it was. If on a recurrence the executor refuses to pay, he does so in his own wrong; and there is no reason, why that should be a charge on the estate which he represents; but he alone ought to sustain it. There is, then, neither inconvenience nor risk in render-

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ing the executor in such a case personally liable. But it is necessary that he should be so, to perfect the system relative to negotiable securities.

[* 191] * The great object of the negotiability of these securities is, that they may be rendered a substitute for money, and pass current as a circulating medium. This purpose would be greatly impaired, if not wholly destroyed, if, in assignments of them by executors, they were only liable in that capacity. If there were assets, in *England* they might be absorbed by debts of a higher degree; and *here* liable to a probate average and distribution. In such a case, then, an executor or administrator ought, as well from considerations of justice, as of public policy, to be holden liable.

But, how different from *that* is the case under consideration! *There* the executor was under no necessity to assign; *here* the defendants were bound by law to sell. *There* it was the duty of the executor to exchange the money he had received for the note he had assigned, the instant after he had notice that it was dishonored; *here* the administrators have, years before any recurrence to them, paid all the money that they received, (and were bound by law to pay it,) towards satisfying the debts of their intestate. It was not in their power to secure themselves against this event; and there is no principle of public policy, which will be satisfied by throwing this loss upon them.

The case of *Appleton* vs. *Binks* (16) was covenant on articles of agreement, whereby the plaintiff, in consideration of a sum of money paid by Lord *Rokeby*, had covenanted to convey to him certain real estate, &c. In consideration whereof, the defendant, *for himself, his heirs, executors, and administrators, on the part of Lord* Rokeby, covenanted that *Lord* Rokeby, *his heirs, &c.*, should pay, &c., and proper breaches being assigned. There was a general demurrer and joinder. Judgment was rendered for the plaintiff.

In that case, the articles of agreement were *sealed with the seal of the defendant;* and he expressly covenanted for himself, his heirs, &c.; whereas, in this case, the defendants affixed the seal of the administrators; and they had authority to affix it. They did not covenant *for themselves*, but they covenanted in their

[* 192] capacity of administrators; * as indeed I think they had authority to covenant. The case of *Appleton* vs. *Binks* seems to me to be no more than the common one, of one man's *undertaking* that another shall perform.

There have been two cases determined in this Court, which may appear to deserve some consideration. I allude to the cases of *Tip*

(16) 5 *East's Rep.* 148.

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pets vs. *Walker & Al.*, (17) and that of *Thatcher* vs. *Dinsmore.* (18)

The case of *Tippets* vs. *Walker & Al.* was covenant on articles of agreement made between the defendants, a committee appointed by the directors of a turnpike corporation, and the plaintiff. There were mutual agreements, and on the part of the defendants, to make certain payments of money, and they affixed their seals. In how many respects, and almost all of them substantial, does that case differ from that now before us! The defendants did not undertake to contract as a committee; they were not, in fact, a committee of the corporation; they made their agreement, they covenanted, and bound *themselves in their own names and capacities;* and they had no authority to contract in any other; and they affixed their own seals. So immense is the difference between the two cases. And this difference affords all the ground, on which the court proceeded in deciding that case. They say, "This is not like the contract made by an agent for the public, and *in the character of an agent;* that the decision of the cause must depend upon the construction of the deed. If the defendants have by their deed personally undertaken to pay, they must be holden; to the agreement the defendants have not put the seals of the directors, nor the seal of the corporation, but their own seals; it is therefore their deed; and if it be not their covenant, it is not the covenant of any person or corporation, and the apparent intent of the plaintiff to have his payment secured by a covenant will be defeated. The defendants do not describe themselves as a committee of the corporation, but of the directors appointed to contract. The corporation * is not therefore bound by this contract, unless it [* 193] gave the directors, its immediate agents, a power to substitute agents under them, by whose contracts it should be bound. But this does not appear, and we cannot presume it without evidence. The directors are not a corporation, but the agents of one; and if answerable, are answerable for their *personal* contracts as *private* persons. The contract before us is a contract of some individual persons for others; and if they have bound themselves, they must look to their principals for indemnity. *But they have expressly bound themselves.*"

These were the considerations, which induced the court to the decision which they made in that case; and it may be safely affirmed, that there is not one which is pertinent to the case now under consideration. It was the contract of the defendants; they expressly bound themselves; they had no authority to bind any

(17) 4 *Mass. Rep.* 595 (18) 5 *Mass. Rep.* 299.

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one else; they affixed their own seals; and it was the *apparent intent* that the payments, which they undertook to make, should be secured by the covenant. That case, then, can be no authority for the decision of this in favor of the plaintiff.

As to the case of *Thatcher* vs. *Dinsmore*, I was not a party to its decision, nor did I ever hear of it until I saw it in print. But I am not disposed, upon this occasion, to call in question its authority. In that case, it was determined, that the guardian of an insane person, who had given promissory negotiable notes to the plaintiff, for the proper debt of his ward, and expressed in the notes, that he did it *as his guardian*, was bound in his private capacity. The court proceeded upon the principles, that the guardian could not, on his own contract, in his capacity of guardian, render the estate of the ward liable to be taken in execution; that a negotiable promissory note, given in consideration of a simple contract debt, discharges it; and upon this fact, that the guardian, at the time he made the promise, had sufficient assets to discharge it. It might, then, perhaps, be reasonable to say, that the defendant in [* 194] that * case should be answerable in his natural capacity; but it is sufficient for me to say that *that* case, in its prominent features, has no likeness to *this*. In that case the defendant was not authorized to contract as guardian, and the contract would have no operation, but as the contract of the defendant in his private capacity. — In this case the defendants had a power to contract, and the contract had its intended effect; it conveyed the estate. In that case an antecedent debt was extinguished; not so here; and there the defendant had assets for his indemnification. From those principles and facts the court inferred the liability of the defendant; and neither of them has any relation to the case before the Court.

But the consideration of absurdity, which the claim of the plaintiff involves, has always struck my mind with great force, as a conclusive reason why he should not recover. The absurdity I mean is that of making two contracts of one, and two deeds of one. The great and main purpose of the deed was, that it should operate as an instrument of conveyance; and for that purpose it must be, as was the intention, the deed of the administrators. Should it have become necessary to set forth a title, derived under the deed, in pleading, the deed must have been alleged to be the deed of the administrators, and the seals their seals; and the exhibition of the deed would doubtless support these allegations. The deed, then, certainly is the deed of the administrators, and the seals their seals in that capacity. Can the deed, then, be the deed of *Thomas Williams* and *Joseph Williams*, in their private capacities? This would

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be of one contract to make two contracts, of one deed two deeds, and to double the number of the seals. I do hope that our law, which I have been proud to consider as the road to justice, under the directions of sound reason and common sense, will not conduct us into such a labyrinth of absurdity.

In the case of *Barry* vs. *Rush*, (19) it was determined that the defendant, who, as administrator, had bound *himself*, * *his heirs*, &c., to another as executor, to abide an award, [* 195] was personally bound, and could not plead *plene administravit*. But the reason, on which that case was decided, as appears by the report of it, and also by the explanation given in the case of *Pearson & Al.* vs. *Henry, Admr.*, before referred to, was because the defendant had bound *himself* by his deed. It was *his* deed and his seal; whereas this is not the deed, nor these the seals, of the defendants in their *private* capacities; but the deed is the deed of the administrators of *William Dudley*, and the seals their seals.

On the whole, if the meaning of the parties can be rendered certain by words, we may say with confidence, that neither did the defendants intend, nor could it be supposed by the grantees, that they did intend, to contract in their private capacities, and that therefore, if we are to be at all directed by what the parties meant it is certain that the plaintiff cannot recover.

As I have never entertained a doubt what the decision in this case ought to be, the length of this opinion, and the labor bestowed upon it, can only be excused by the ingenuity of the argument in favor of the plaintiff, and the zealous sincerity with which it was enforced. Upon the whole, I am of opinion that such entries be made on the issues in law presented by the pleadings, as to entitle the defendants to judgment.

I have not thought it necessary to state particularly the several issues in law presented by the pleadings, because they all terminate so as to show, if my opinion be correct, that the defendants are entitled to judgment. Nor have I thought it necessary to declare the result of my consideration of the other points, which were, with much technical learning and great ingenuity, exposed and enforced by the defendants' counsel; because I feel satisfaction in coming to a result, upon principles which will do exact justice to the parties, by conforming their contracts to their understanding of its meaning, at the time it was formed.

* SEWALL, J. This action was brought for an al- [* 196] leged breach of covenant of general warranty; and the defendants are charged personally, in their private capacities, upon

(19) 1 *D. & E.* 691.

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a covenant expressed in a deed of bargain and sale, made by them as the administrators of the estate of *William Dudley*, deceased, intestate and insolvent.

The defendants have had oyer of the deed containing their covenant, and of another conveyance respecting the same lands and tenements, referred to in the recitals of their deed; and these instruments, copied upon the record, contain, as it appears to me, the whole case to be decided. For the breach, alleged in the declaration, is neither traversed nor avoided by any material fact averred in the multiplied pleas in bar, containing traverses and averments of conclusions in law.

The defendants, in their deed, undertake to convey to *Increase Sumner* and *Elizabeth Sumner*, and to their heirs and assigns forever, an equity of redemption, which the said *Dudley* had at his decease, in certain lands and tenements described, and being the same, which he in his lifetime had conveyed to the said *Thomas Williams* in mortgage, and as security for a certain sum of money remaining due to him. And it further appears, from the recitals in the deed, and from the conveyance by *Thomas Williams*, introduced upon this record, that the said *Increase* and *Elizabeth*, either before or at the time of their purchase of the said equity of redemption, became the assignees of the said mortgage, and paid therefor a certain sum of money to the said *Thomas Williams*.

To the conveyance of the equity of redemption certain covenants are annexed, in these words: "*And we, in our said capacity of administrators, do covenant with the said* Increase *and* Elizabeth, *their heirs and assigns, that we, as administrators, are lawfully seised of the premises; that they are free and clear from all encumbrances* by us, *or* with our knowledge, made, *saving, &c.; that we have, in our said capacity, good right to sell and convey the* [* 197] * *same to the said* Increase *and* Elizabeth; *and that, as administrators as aforesaid, we will warrant and defend the same to the said* Increase *and* Elizabeth, *their heirs and assigns forever, against the lawful claims and demands of all persons.*"

In this action by *Elizabeth Sumner*, the surviving grantee, commenced in her lifetime, and now prosecuted by her administrator, the breach of covenant is alleged in three several counts, with some little variation to be noticed hereafter, but otherwise in these words; "the said *Thomas* and *Joseph* have not warranted and defended, &c., for that one *Joseph Dudley*, &c., long before, &c., and at the time, &c., and continually until the eviction, &c., had good and lawful right and title, &c., as eldest son and heir male of the body of *William Dudley* aforesaid, by virtue of the gift of one *Joseph Dudley*, deceased, made to the said *William Dudley*, and

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the heirs male of his body;" and then an eviction by suit, judgment, and execution, under that title, is set forth and averred.

This breach, if suitably alleged, is to be taken as confessed by the pleadings, which refer to the consideration of the Court the general inquiry, whether this action is maintained against the defendants, upon the case disclosed.

The deed of the defendants is pursuant to a license and authority granted to them to convey the real estate, of which their intestate died seised in fee simple, for the payment of his just debts, according to the provisions of the statutes in that case. In obtaining and exercising this authority, they necessarily acted as administrators; the consideration paid for the equity of redemption conveyed by them, availed to the creditors of *William Dudley*, and, it may be presumed, has been paid over to them before this action was brought; and in their deed, according to the words of it, they not only convey as administrators, but they profess to covenant, and even to sign and seal, as administrators.

In this view of the case, the question arises, whether the * defendants personally, and in their private capaci- [* 198] ties, are liable for any breach of the covenants expressed in their deed.

After much deliberation, the Court continue divided upon this question; and that I may endeavor to justify the opinion I have adopted, I shall examine it rather more at large, than otherwise would have been necessary or convenient.

The defendants contend, that they conveyed and covenanted in a character of agency; and therefore that the effects for which they acted, that is, of *William Dudley*, in their hands to be administered, if any there were, became liable for their transactions; or, at any rate, that a deed given and accepted as a deed by administrators, can only operate, either for the conveyance or covenants therein, according to their power to charge the effects of their intestate; and that no other intent of the parties can be supposed or admitted, even if certain clauses of the deed are rendered, by this construction, altogether vain and nugatory.

The contracts of agents, whether in public or private concerns, as of a person acting officially for the public, or of a servant in the business of his master, made according to their authority and with a disclosure of their agency, do not render the agents personally liable; unless by an express stipulation, in which the agent engages his own responsibility and credit. This rule applies, however, only where a principal is disclosed, and when the contract may be understood to have been made with him according to the obvious intentions of the immediate parties.

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In this respect it seems impossible to apply the rule to the contract of an executor or an administrator, in administering the estate or effects of deceased persons. The office of an administrator is rather a trust, than an agency. The personal estate of a deceased testator or intestate is vested absolutely in the executor or administrator. The real estate is not vested in them by virtue of their office; but a license to sell for payment of debts, obtained [* 199] pursuant to * the statute, vests in the executor or administrator an authority and trust, to be executed upon their own responsibility. In exercising an authority of this description, an administrator is not the representative or agent of any other person; and to suppose the other effects of the deceased liable for the contracts of an administrator, in selling the real estate of his intestate, would be productive of the utmost perplexity and confusion.

Several decisions have been cited in the argument for the plaintiff, to show that in the sale or disposal of the personal estate, an administrator renders himself personally liable; and this is according to the course of our daily and uniform experience upon this subject. Thus, in assigning a negotiable note or bill of exchange, payable to his intestate or his order, although an administrator makes his endorsement in that capacity, and the transfer has effect by virtue of his office; yet the guaranty of payment, implied by the custom of merchants, is the personal contract of the administrator, for which he is liable *de bonis propriis*. (20) An administrator is liable in the same manner upon his express contract made for the debt of his intestate, as in the case cited at the bar, of *Barry* vs. *Rush*; (21) where an administrator became bound for the performance of an award upon controversies and demands between the intestate and the other party to the submission. (22) And the decision was not upon the ground, that the bond was an admission of assets; but because he had expressly bound himself In that case, as in this, the party finally made liable had bound himself as administrator to pay. But the naming a party, otherwise sufficiently described, as an executor or administrator, may be surplusage; and is so held where the words are unnecessary to the contract or to a demand by or against him, in a declaration or suit. (23)

In short, the general principle undoubtedly is, I think, that an administrator has no power of charging the effects in his hands to be administered, by any contract originating with him- [* 200] self; and it seems to be clearly understood, by the * de-

(20) 1 *D. & E.* 487, *King & Al.* vs. *Thom.*
(21) 1 *D. & E.* 691.
(22) 5 *D. & E.* 6, *Pearson* vs. *Henry.*
(23) 1 *Vent.* 49.

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cisions which have been cited, that his contracts in the course of his administration, or for the debts of his intestate, render him liable *de bonis propriis.* (24)

But it is contended, for the defendants, that whether the administrators had, or had not, a power of charging the assets of the deceased *William Dudley* with the covenants in this deed, yet the exposition of their character and capacity in the contract itself, and the subject matter of it, necessarily require a construction, which discharges the defendants from any liability upon the failure of the title, which they undertook to convey; and that the covenants of the defendants must have been intended by them, and accepted by the grantees in the deed in question, either as covenants void in their operation, or as covenants which respected the acts of the grantors only.

Contracts under seal avail by their solemnity, even when voluntarily made, and without any consideration to the party engaged. It is said indeed, that on covenants under seal, merely voluntary nominal damages only are recoverable at law; but a covenant by one for the debt or duty of another, or where the party, in whose favor the contract is made, foregoes some advantage, or incurs an expense, or suffers some loss in consequence of placing his confidence in another's undertaking, — no case of this description can be viewed as a contract merely voluntary, or estimated as a covenant without consideration. (25)

Warranties or stipulations of property and title, in sales of goods, or bargains and conveyances of real estate, arise sometimes by implication of law, and are sometimes expressed, and make a part of the contract. Whether, upon a sale by an executor or administrator, of the effects of his testator or intestate, with a full disclosure of his character and trust, a stipulation of title and property would arise by legal implication, to affect him personally, is a question we are not called upon at this time to determine. In the case at bar, the plaintiff relies upon an express warranty of the title or interest purchased; and this covenant forms an important part of the contract contained in the deed of the defendants.

* An administrator acting under a license, and exercis- [* **201**]
ing an authority to sell the real estate of his intestate,
is not required, by any duty of his office or trust, to enter into a personal covenant for the absolute perfection of the title, which he undertakes to convey; or for the validity of the conveyance, beyond his own acts. It will be admitted, however, that he is at

(24) 4 *D. & E.* 347, *Jennings* vs. *Newman.*
(25) *Powell on Contracts*, 340, 346 — 1 *Stra.* 553. — 1 *Rol. Abr.* 22. — *Hob.* 4, 5 *Cro. Jac.* 342.

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liberty to do it, if he chooses thus to excite the confidence of purchasers, and to enlarge the proceeds of the sale; and that he may be competent to engage his own credit collaterally in the conveyance; in so much as that a contract to this effect is not unlawful or void in itself for any absurdity or inconsistency.

In the case supposed of a sale by an administrator, a covenant of title is not perhaps to be inferred upon the mere implication of law, as upon the words *dedi* or *demisi*. I say perhaps, for in the case of *Knipe* vs. *Palmer*, (26) which was the case of a lease by the committee of a *non compos*, made in his own name as committee, *nil habuit in tenementis* was holden to be a good plea for the lessee; yet the court inclined to the opinion, that the committee, as lessor, was personally liable upon the covenant in law implied from the word *demisi;* but this question was avoided in the decision.

If the deed contains express covenants of a limited nature, then it is clear that no general covenant of title can be implied. If the deed contains express covenants of the administrator, as in the case at bar, he is certainly not to be holden beyond the legal import and effect of such covenants. If these are doubtfully expressed, and the words admit of a construction which restrains the covenants to his own acts, this may be reasonably conjectured to be the true construction; for this is the most natural, and therefore the most probable intention of the parties in the actual circumstances of the case. The rule then applies, that where sentences are ambiguous, or capable of several significations, conjectures are necessarily resorted to, to determine the meaning of the parties; and [* 202] conjectures for * this purpose may be drawn from the subject matter, and from the circumstances of the contract. (27) This rule is, however, applicable only where the sentences, in which the parties have expressed themselves, either from the terms or their arrangement, leave their intentions doubtful. For otherwise the most usual and natural import is to be given to the instrument or evidence of the contract; and to resort to rules of construction would be to substitute probable conjectures for evidence that is direct and unalterable. *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est.*

I have stated the words of the deed of the defendants, in which their covenants subjoined to their conveyance, are expressed; and I have heretofore examined them very deliberately and carefully. Among their covenants of seisin, of a good right to sell and convey, and to warrant and defend, there is an intermediate covenant against encumbrances restricted to the knowledge and acts of the defend-

(26) 2 *Wils.* 130. (27) *Powell on Contracts*, 377.

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ants. Without resorting to the mechanical rule, as it may be called, of determining the sense by a particular arrangement of words and sentences, which is certainly not always conclusive; and taking all these covenants together, and giving every possible effect to the intermediate covenant, I have been unable to perceive any restriction in sense or expression, to be drawn from it to the other covenants in this deed. If it were possible to apply the restrictive words, in the intermediate covenant, to the preceding covenant of seisin, or to the subsequent covenants of authority and of warranty; if this last, being the covenant immediately in question, were even rendered thereby doubtful or ambiguous, as to the intention of the parties, there would be a necessity of resorting to probable conjectures, which might be very properly drawn from the subject matter, and the circumstances of the contract. The covenants preceding, and the covenants subsequent to the covenant against encumbrances, are not of the same import. (28)

*Covenants respecting the seisin, the power to convey, [* 203] and the general title, made without restriction, may well consist with a restrictive covenant against encumbrances. (29) And taken altogether, the several covenants recited stand unconnected in sense and expression, and uncontrolled the one by the other: and it is impossible to doubt of the meaning and import, generally affixed to the words and sentences, in which the covenants in the deed of the defendants are expressed.

Another objection to this action is a supposed *merger* or extinction of the estate or interest, whatever it was, conveyed by the deed of the defendants. This being a sale of an equity of redemption to the assignee of the mortgagee, these several interests, separate and distinguishable, while existing in different persons, became united by these conveyances to the same persons, and in them constituted in effect but one title; and the inference is, that the covenants respecting the equity of redemption became thereby extinct; and that an eviction from the bargained premises, of which only an equity of redemption was the subject of the conveyance by the defendants, was no breach of their covenant.

But this objection has been sufficiently answered. The remedy now sought upon the deed of the defendants, is not the remedy given upon a warranty at common law, considered as a covenant real, entitling the grantees to a render in value of other lands of the warrantor in case of an eviction from the lands conveyed aud warranted. Nor is this a warranty relied on as a bar and title in itself, against the heirs, lineal or collateral, of the warrantors.

(28) See 2 *Bos. & Pul.* 13. (29) 2 *Rol.* 250, *l.* 5.

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The cases cited for the defendants in support of this objection are all of that description, in which it is obviously important to ascertain the title of the party claiming under the warranty; and those remedies are inapplicable perhaps to the conveyance of an equitable interest, as distinguished from the legal and absolute title. (30)

[* 204] *The case at bar is an alleged breach of an express personal covenant, annexed to a conveyance of an interest, valuable in legal contemplation, of a value acknowledged by the consideration received for it by the defendants, for which their conveyance of it was made. It was bargained and sold by them, and purchased by *Increase* and *Elizabeth Sumner*, as a part of the title, as a subsisting interest in the lands and tenements mortgaged by *William Dudley* in his lifetime. The fact is now confessed by the defendants, that *William Dudley* was tenant in tail only of the lands mortgaged. This right in equity of redeeming therefore expired with him, as the law of the land was at the time of his death. Or, if we suppose a right in equity gained in fee simple, of which *William Dudley* may be technically said to have died seised, and that this was a title which the defendants had authority to convey as administrators, yet they have not warranted or defended it; nor could it be warranted and defended by their deed against all lawful claims and demands whatsoever; for the elder title of the heir in tail, and the eviction under it, are averred in the declaration, and confessed by the defendants in their pleadings.

These observations apply also to the objections which have been raised against the form of the present action, from a supposed variance of the counts from the deed of the defendants. Whatever may be the form of that objection as made to the first count, it has no foundation, I apprehend, when applied to the second and third counts; where the premises, or the interest which the defendants sell and convey in the lands and tenements described, are stated in the words of the deed; and the covenant upon which the action is brought, and the breach of it, are set forth and assigned by the same recourse to the words of the deed. In the strictest comparison, therefore, of the second and third counts with the deed of the defendants, there is no variance. But this strictness is not required after oyer, and a plea in bar upon the merits.

[* 205] It is sufficient, *if the deed is competent evidence to support the declaration.

The objection, which has been considered, arising upon the nature of the interest conveyed by the defendants, and the fact

(30) 4 *Com. Dig. Garranty, A. & G.* — *Co. Lit.* 389, *a.* 379, *b.*

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that *Increase* and *Elizabeth Sumner* claimed and held by another title, and as assignees of the mortgage of *William Dudley*, in his lifetime, the lands and tenements described in the deed of the defendants, their conveyance extending only to a remaining interest therein, will deserve further attention in the inquiry of damages, if this action should be finally maintained for the plaintiff, and the value of the premises at the time of the eviction is to be considered as the measure of the damages recoverable therein.

The case may be supposed of general covenants of title and warranty, annexed to a mortgage in fee simple, to an assignment thereof by a mortgagee, and to a conveyance of the equity of redemption by an assignee of the mortgagor made also to the assignee of the mortgage; and an eviction by an elder title, which avoids the mortgage and the assignments. If the value of the premises at the time of the eviction is to be the measure of damages, upon which of the deeds is the value to be assessed, or by what apportionment, if it is divisible according to the interest conveyed by the several deeds?

If the deed of the defendants was void in its creation, because they acted without authority in selling and conveying an estate of which their intestate was tenant in tail only, and therefore not liable for the payment of his debts, as the law then was; their collateral covenant, broken when it was made, renders them liable for the consideration money only, and the interest thereof from the time of the contract, with the addition of the expenses incurred in defending the suit. But as no direct argument upon this question has been gone into, I have not come to a decisive opinion upon it.

Upon the whole, the covenant in question, to warrant and defend, is to be construed in this case a covenant of
* title in *William Dudley*, effectually conveyed by the [* **206**]
deed of the defendants, to avail against the lawful claims and demands of all persons. A breach of this covenant is sufficiently alleged in the declaration, or at least in the second and third counts. The title conveyed and warranted is described as a right of redeeming lands and tenements subject to a mortgage. An eviction by an elder and lawful title, from the lands and tenements described, sufficiently set forth and averred, justifies the general averment of a breach, that the defendants have not warranted and defended the interest therein conveyed by them, and which they covenanted to warrant.

Nor is it a valid objection to a right of action upon an express personal covenant, that the particular mode of interest described in the conveyance, to which the covenant is annexed, is united in the grantee with another title, inconsistent with the continued separation

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of the interest, as a subject of legal contemplation, or as an interest for which a specific remedy is maintainable. A failure of the whole title is a breach of a covenant to warrant any part or interest therein against all lawful claims; and in an inquiry of damages, the nature and value of the interest conveyed, to which the covenant was annexed, is to be considered and estimated.

A covenant of this description, annexed to a conveyance by administrators, acting under a license to sell the real estate of their intestate, although expressed to be made in that capacity, is necessarily a personal covenant, for which they are liable *de bonis propriis*, because the effects of the intestate are not liable to the contract of an administrator, as such, and because an express contract of that kind by an administrator can have no other legal operation; and when clearly and definitely expressed, no interpretation contrary to the words of a solemn instrument is admissible.

Upon the whole, my opinion is, that the plaintiff is entitled to judgment upon the several issues in law joined in the action.

[* 207] * PARKER, J. I shall confine my observations to the great question in this cause, whether the defendants are personally answerable in damages for a breach of the covenants contained in the deed, which makes a part of the pleadings; being satisfied that, if they are so answerable, the form of the declaration, in some one of its counts, is sufficient to entitle the plaintiff to recover.

The deed was made by the defendants, in the capacity of administrators of the estate of *William Dudley*, and purports to be pursuant to a license obtained from the Court of Common Pleas to sell the estate of which the said *William Dudley* died seised; — the object of the sale was to pay the debts of the deceased; — and it must be presumed that the purchase money, which constituted the consideration of the deed, has been appropriated to the purpose for which the sale was effected, and not to the personal benefit or advantage of the defendants. Peculiar caution is observed also in all parts of the deed, to avoid the supposition that the defendants intended to take upon themselves any personal liability; and *in the execution* of the deed they, each of them, style themselves administrators on the estate of *William Dudley*.

From all which it must be inferred, that the grantors intended to guard against any recurrence to themselves or their estates, in case of a failure of title; and I think the inference equally clear, that the grantees themselves did not rest upon a supposed personal liability of the grantors for their security; but both parties believed that whatever virtue there was in the covenants, the estate of *Wil*

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liam Dudley, and not those of the defendants, was to be affected by them.

It is more probable, however, that neither party, when entering into the contract, calculated upon a future necessity of resorting to the covenants. *William Dudley* died in possession of the estate, and it had been long in the *Dudley* family. The title of the heir in tail, which ultimately ousted the grantees, was then dormant; and an accidental *discovery of the will of his [* 208] ancestor, and of the common recovery under which he held, long after the sale by the administrators, afford a probability that the grantors and grantees were equally unsuspicious of any defect in the title of the estate, about which they were negotiating. This supposition is much more honorable to the parties, than that the grantors should have known that they were selling a rotten title on the one hand, or on the other that the grantees should have known that the legal effect of the covenants was to bind the defendants personally, notwithstanding the peculiar pains taken to avoid such liability — a supposition extremely injurious to the memory of one of the most honorable and upright men that have lived in our community.

I am therefore disposed fully to agree with the counsel for the defendants in the position, that the nature of the transaction, the character in which the grantors contracted, and the language of the instrument, all concur in proving that it was manifestly against the intention of the parties, at the time the deed was executed, that the grantors should be held to a personal responsibility upon the covenants. At the same time it must be confessed to be equally clear, that both parties believed that the covenants were to be effectual in case of an interruption of the estate supposed to be granted; although probably neither of them contemplated the happening of such a contingency.

This unforeseen event, however, did happen; and it seems to be clear that the grantees have no remedy against the estate of *William Dudley*, notwithstanding the covenants made by his administrators. We are therefore reduced to the alternative of declaring the covenants to be void and wholly ineffectual; or of giving them operation against the defendants in their personal and individual capacity.

The objection to the liability of the defendants, which strikes the mind with most force, is, that they will thus be subjected to the payment of damages for defect of title, contrary to their intention when they entered into the contract, *and [* 209] when they were to derive no personal benefit from the execution of their trust as administrators by the sale of the estate.

This may be a hard principle of the law; but it results from the

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application of legal principles, which have stood the test of time, and which experience has proved to be wise, useful, and necessary. — Whenever a man, by an instrument under seal, undertakes to stipulate for another, if he acts without authority, or beyond his authority, he is answerable personally for the non-performance of the contract. — Such is the case of an attorney stipulating for his principal, not having authority, as in the case of *Appleton* vs. *Binks*; — Of the committee of the directors of a turnpike corporation, as in the case of *Tibbets* vs. *Walker*; — Of a guardian giving a promissory note as guardian, as in the case of *Thatcher* vs. *Dinsmore*; — Of an administrator binding himself to perform an award respecting the affairs of his intestate, as in the case of *Barry* vs. *Rush*.

Now, in all these cases, as well as in many more which might be cited, it is manifest that the parties held answerable never intended to make themselves liable; nor is it perceived that they personally received any valuable consideration for their undertaking; and yet it was holden that, as they could not by their act bind those for whom they intended to stipulate, they were bound themselves. Neither is it unjust that men pretending to give a security to others, by assuming a relation which does not belong to them, should supply out of their own means the security which they failed to impose upon their principals; and this, although they are chargeable with no fraud. For negligence of the rights of others is often a ground of liability without any advantage to the person who is to become responsible.

It is true, that the just mode of ascertaining the *legal effect* of a contract is, to know the intention of the parties to it; and much less stress is laid upon the technical expressions in a [* 210] deed, or other legal instrument, now than * formerly. Indeed, there appears to be little difference, in modern times, in the rules of construction, as applied to wills or deeds. What did the parties mean? — is the great question. But, as I apprehend this beneficial rule, it is applicable to clauses and provisions in the instrument, the words of which are of a doubtful import; and seldom is called in aid to settle the question of the liability of any party to the instrument, when its meaning has been ascertained. An attorney, who contracts for his principal, may mistake his authority, and make a contract beyond the letter of his power. He certainly does not mean to charge himself; and yet he would be chargeable, if any damage arose from the non-performance of his contract. — A sheriff, who should sell an equity of redemption *virtute officii*, and should enter into covenants respecting the title, would certainly not charge the debtor by his covenants; but

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would charge himself, although such was not his intention. — A collector of taxes, who should sell a non-resident's land agreeably to the tax acts, and should covenant respecting the title, certainly could not bind the owner of the land; nor would he mean to bind himself; for, like the administrators in the case at bar, he would receive no benefit from the sale, acting merely in discharge of a trust, and that, too, perhaps, *imposed* upon him by law, and not voluntarily accepted, as it must be by administrators. And yet there seems to be no doubt, that he would be personally bound by such covenants.

The case of *Bickford* vs. *Page* (2 *Mass. Rep.* 455) was not dissimilar to the case now before us. *Page* was a collector of taxes for the town of *Parsonsfield*, and sold a tract of land belonging to a non-resident proprietor, who had neglected to pay his tax. The deed was made expressly as collector of the town of *Parsonsfield*, and the authority was recited in the premises. The covenants were similar to those in the deed of the administrators in the present case; and equal caution was used in stating the covenants to be made by him in the capacity in which he acted. It
* was a case very strongly contested. I was of counsel [* 211]
for the defendant, and was associated with a gentleman, who never lost a cause by not presenting points sufficient to the court, and who well understood the advantage of special pleading; and yet the cause was defended upon other points doubtful in their issue to us at the time; and it never occurred to either of us that the defendant was not answerable *de bonis propriis* for a breach of any of his covenants. It happened that the only covenant broken was the covenant of seisin; so that the damages were inconsiderable. But at that period the distinction in the effect of covenants was not recognized in our courts; and we appre hended that the rule of damages would subject our client to the loss of several hundred dollars, when the consideration of the deed was little more than one dollar, and that went into the treasury of the town, and not into the pocket of the grantor; so that we had every motive to present a question to the court, which would have given the defendant his costs, if it had been determined in his favor.

Now, in point of hardship, a collector of taxes, who is obliged to accept the office or pay a fine, whose duty in raising money by the sale of land is quite as arduous as that of an administrator, whose compensation for his labor is at least as trifling, will not yield the preëminence to an executor or administrator, who incautiously steps beyond his duty or authority, and may lure people to purchase by offering them covenants of title intended to operate against the

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estate they represent, but which, by the principles of law, cannot produce the effect intended.

A class of cases has been relied on by the defendants, to show that where parties have contracted *in auter droit*, although they have failed to bind their principals, they have been discharged from any personal responsibility. The principle maintained in those cases is, that when it appears by the contract attempted to be enforced, that the party charged was an agent for the public,
[* 212] the agent * shall not be compelled by suit to pay. The effect produced in my mind by a contemplation of those cases is contrary to what was expected by the counsel who urged them.

They were all decided upon grounds of public policy, lest the service of the government should be delayed or prejudiced, if its servants should be liable to suits on contracts avowedly made by them on the public account. Now, if the mere intent of these agents not to bind themselves would have been sufficient for their defence, the court would have had no occasion to resort to the dangerous ground of state policy to relieve them; for it must have been manifest in the several cases of *M'Beath* vs. *Haldimand*, *Umvin* vs. *Wolsey*, *Hodgdon* vs. *Dexter*, and *Brown* vs. *Austin*, that the defendants never intended to bind themselves personally, but merely to give those with whom they contracted proper evidence of their demand against the respective governments.

Excepting these cases, which stand as exceptions to the general rule, there does not seem to be a single case, which shows that a man entering into a contract under seal for another, for whom he had no right to act generally, or to the extent of his contract, has been held to be discharged from the burden of his contract, not although, in the apprehension of both parties, he contracted avowedly *in auter droit*, and was in no wise interested in the consideration of his contract.

This principle seems to be settled beyond question in the law merchant. Suppose a factor, authorized to sell goods on commission, should undertake, without directions from his principal, to warrant the goods to be of a particular character or quality, and on their being sent to market, it should turn out that they were of an inferior quality; can there be any doubt that he would be answerable in damages? yet there would be many compassionate claims, as that he had only small commissions for selling, that he had settled with his principals, who were unable to refund to
[* 213] * him if obliged so to do, &c. Such a point as this I ruled in the case of *Stocker* vs. *Amory*, and I have never heard the principle questioned by any lawyer.

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Indeed, there are certain covenants in this deed, which no one could imagine for a moment could be enforced, except against the defendants in their private capacity. Such is the covenant that they were seised in fee simple of the estate sold, — that they had good right to sell. Here also they covenant in their capacity of administrators; but no one would think of instituting a suit against them in their capacity for the breach of these covenants, any more than if they had covenanted that they were administrators, and it had turned out that no letter of administration was ever granted. It would be no answer to such an action, that their deed was signed by them as administrators only, that they never intended to make themselves liable, that all the proceeds of the sale had been appropriated, and that there were no funds, out of which they could indemnify themselves. The reply to all this would be, You meant to secure us by these covenants, and, as you had no authority to do it in the form you contemplated, you are bound by your deed to do it yourselves.

This course of reasoning, and the authorities referred to, have satisfied me that the defendants are personally bound by the deed, which they executed as administrators, notwithstanding their manifest intent not to be so bound.

Another question, and a very important one as it respects the consequences of this action to the parties, is, What shall be the construction of the covenant in the deed, for the breach of which the present action is brought? Shall it be taken independently, and have the natural force and meaning of the words, as if disconnected from the other covenants and other parts of the deed? Or shall it be construed with relation to the whole subject matter, and according to the true understanding of the parties when it was made?

*The latter is undoubtedly the true rule; and here I [* 214] am willing to search diligently for the intent of the parties, and to give it full effect when discovered. The fanciful mode of construction once adopted, which depended upon the collocation of the particular clause, to which a restrictive power was attached, has given place to the more sensible rule of taking the whole instrument into consideration, and determining, from a general knowledge of the views and objects of the parties, their meaning in any particular sentence or provision.

In the book which bears the name of *Shepard's Touchstone*, (*chap.* 7, *page* 163,) but which is supposed to be the work of the eminent Judge *Dodderidge*, it is laid down, that if the lessor covenant with the lessee, that he hath not done any act to prejudice the lease, but that the lessee shall enjoy it against all persons, these

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words *against all persons* shall refer to the first, and be limited and restrained to any acts done by the lessor, and no breach shall be allowed but in such an act. And the case of *Browning* vs. *Wright*, (31) shows that the same principle is recognized in modern times.

Indeed, nothing can be more equitable, than that the situation of the parties, the subject matter of their transactions, and the whole language of their instruments, should have operation in settling the legal effect of their contract; and it would be a disgrace to any system of jurisprudence to permit one party to catch another, contrary to the spirit of their contract, by a form of words, which perhaps neither party understood, but which were introduced by the scrivener more in conformity to some general scheme of conveyancing of his own, than by the direction or in conformity to the wishes of those for whom he was acting.

In the deed before us there are *four* several covenants. The *first* is, that the defendants, as administrators, are seised in fee of the estate, which they undertake to sell. A breach of this covenant, according to cases settled, would subject them to a [* 215] repayment of the consideration money, * with the interest, and no more; for it was broken the moment it was made, and the grantees ought to have brought their action instantly on the discovery of the defect in the title, and been restored to what they had lost, without waiting for an eviction. (See the cases of *Marston* vs. *Hobbs*, and *Bickford* vs. *Page*, 2 *Mass. Rep.*)

The *second* covenant is, that the premises are free and clear of all encumbrances done or suffered by them or with their knowledge, saving the mortgage. There could be no breach assigned of this covenant, except in some act done by the defendants, tending to defeat the estate; so that had *William Dudley*, or any of his ancestors, conveyed by mortgage, or otherwise encumbered the estate, by which means it should have been lost or impaired in value to the grantees, there would have been no remedy under this covenant.

The third covenant is, that they had good right to sell; which is a special covenant, amounting to no more than the covenant of seisin.

The *fourth* covenant is, that, *as administrators*, they will warrant and defend the same, &c., against the lawful claims of all persons. This covenant, it is contended, obliges them to answer in damages, because the land is taken from the defendants by a paramount title, without any act of their own, and although they knew not of the existence of such a title; and this must be the effect of it, if not

(31) 2 *Bos. & Pul.* 13.

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restricted by the palpable intention of the parties, as discerned in the other covenants, and indeed in all parts of the instrument. Why should the defendants have restrained the operation of the preceding covenants to encumbrances done or suffered by them, or with their knowledge, if, in the very next, and, indeed, it may be said, in the same sentence, by a general sweeping expression, they were answerable whenever an eviction should take place by any person having title? This last covenant would certainly comprehend its predecessor, and render the restriction in that wholly nugatory. But effect is to be given to all the words of an instrument, *and the true meaning is to be extracted [* 216 from a comprehensive view of the whole.

But it may be questionable whether, stating the covenant by it self, enough may not be found to show the intent of the parties to be short of a general warranty of the land against all titles. The covenant is, that the defendants will, *as administrators*, warrant and defend. — Is not the fair meaning of this, that whatever shall be rightful for them to do in their capacity shall be done to secure the title to the grantees? — They are personally answerable for the performance of this covenant, to its utmost legal extent. It comprehends in it a covenant, that they are lawfully administrators, and that they had a right to sell what they had undertaken to sell; and indeed must be construed to be an assurance to the grantees of the title which they conveyed to them. Still, in my apprehension, it falls short of an engagement, at any future time, to defend the grantees against an ouster by a title paramount; but may reasonably be considered as limited and restrained in its operation by the whole context of the deed.

This construction is also aided, when we consider the situation of the covenantors, acting *in auter droit*, having no personal interest in the transaction, and no inducement to pledge, possibly their whole fortunes, upon an indefinite and illimitable warranty of title to the purchasers. It is not unreasonable to suppose that, in order to facilitate the sale, they were willing to covenant against their own acts, and that they were duly authorized to do what they had undertaken to do; but it is hardly possible to conceive that they would intentionally have bound themselves, to all future time, to pay the value of the estate, in case the title should happen to fail.

Another circumstance in all these covenants will tend to show, that both parties supposed, that whatever effect the covenants were to have was derived from their relation to the estate as administrators; and that is, that they covenant *only for [* 217] themselves, omitting the usual expressions in general covenants, of their heirs, executors, and administrators. Now,

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although the omission of these words might not vary the effect of a covenant made by a man respecting an estate of his own, when he intends to bind his estate, yet this, together with the other circumstances mentioned, may help to show the true ground upon which the parties contracted.

The case of *Browning* vs. *Wright*, which I before referred to, fully maintains the principles adopted by me, in construing this covenant. The case is not dissimilar. It is so well reported, and the argument of Lord *Eldon* is such a triumph of common sense over technical niceties, that I would rather recommend the reading of the whole, than to weaken by attempting to epitomize it. In the close of his observations, the chief justice says, the intent of the parties is to be collected from the warranty, the other covenants, and the *primâ facie* nature of a purchase of an estate of freehold; and he says that the covenant declared on was either part of the other covenant, which was special; or, if a substantive covenant, must, by reference to the whole context of the deed, be considered a special covenant. — Justice *Buller* says, "He has expressly told us, in one part of the deed, that he means to covenant against his own acts, and are we to say he has in the same breath covenanted against the acts of all the world? If the court is driven to say that these two covenants must stand together, they must do so by pronouncing judgment on the words of this particular clause, and shutting their eyes against all the other parts of the deed."

I am therefore satisfied upon the reason, and believe that I rest upon sufficiently respectable authority when I pronounce my opinion, that the covenant, upon which this action is brought, means nothing more than is contained in the first covenant; *viz.*, that the defendants were seised of the estate, which, as they could not be in their capacity of administrators, would undoubtedly be [* 218] construed to mean, *that, by virtue of their authority, they had power over the estate, to transfer it, and convey a good title to the grantees.

A question then arises, upon which I have entertained much doubt; *viz.*, whether a breach of the covenant, according to its true construction, is well assigned by setting forth the title of *Joseph Dudley*, and an ouster by him. If this was a covenant merely against the acts of the defendants, or of persons claiming under them, then there is no sufficient breach assigned. But upon the construction which I give to the covenant, which is that they have a title to convey, or that they were seised or properly authorized to convey; — then it appears by the pleadings that *William Dudley* had no equity of redemption; and, as they were authorized to sell only the estate of which he died seised, the covenants were broken

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as soon as made, and the breach is well enough assigned by showing a paramount title, and an ouster under it; for it is held that no particular words are necessary to the assignment of the breach; but it is sufficient to show it substantially.

The plaintiff's replications to the defendants' first, third, fifth, sixth, and eleventh pleas in bar were thus adjudged good and sufficient, and the defendants' second, fourth, seventh, eighth, ninth, and tenth pleas in bar were adjudged bad and insufficient.

At the sittings here after this term a jury was impannelled before *Sedgwick*, J., to assess the plaintiff's damages, who returned the following verdict, *viz.*: —

"The jury assess the damages for the said *William H. Sumner*, in his said capacity, as follows, that is to say, —

"If the Court shall be of opinion, that by law the plaintiff is entitled to recover the consideration money mentioned in the deed of the defendants, and the interest thereof from the date of said deed, then the jury assess the damages at the sum of 2391 dollars 71 cents.

"If the Court shall be of opinion, that the plaintiff by law is entitled to recover the said consideration money, and the interest aforesaid, and also the expenses sustained *by [* 219] the said *Elizabeth* in the said suit of the said *Joseph Dudley* against her, and nothing more, then the jury assess the damages at the sum of 4681 dollars 72 cents.

"If the Court shall be of opinion, that the plaintiff is entitled to recover the said consideration money, with the interest thereof from the time of the eviction aforesaid, with the said costs sustained by the said *Elizabeth*, and nothing more, then the jury assess the damages at the sum of 3673 dollars 67 cents.

"If the Court shall be of opinion that the plaintiff is entitled to recover the said consideration money, and the amount paid for the assignment of the said mortgage deed, with interest on these sums from the dates, with the expenses aforesaid, and nothing more, then the jury assess the damages, at the sum of 8933 dollars 68 cents.

"If the Court shall be of opinion that the plaintiff is entitled to recover the said consideration money, and the amount paid for the said assignment of the said mortgage deed, with interest on those sums from the time of the eviction aforesaid, and nothing more, then the jury assess the damages at the sum of 3840 dollars 19 cents.

"If the Court shall be of opinion that the plaintiff is entitled to recover the value of the said premises, at the time of the eviction aforesaid of the said *Elizabeth* therefrom, together with the expenses by her sustained as aforesaid, and the interest thereof from the time of said eviction, then the jury assess the damages at the sum of 39011 dollars.

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"And if the Court shall be opinion that the plaintiff is entitled to recover the said consideration money, together with the amount paid for said assignment, and the amount paid to *Sarah Dudley*, widow of said *William Dudley*, as the consideration for her release of her right of dower to said *Increase* and *Elizabeth*, with interest on these sums from the date aforesaid, with the expenses aforesaid, and nothing more, then the jury assess the damages at the sum of 9456 dollars 45 cents."

[*220] *At the hearing before the jury, the plaintiff offered evidence to prove to the jury, that the defendants, at the time of making the sale of the lands mentioned in the declaration, and of executing the deed to *Increase Sumner*, and *Elizabeth Sumner*, knew that *William Dudley* was not seised of an estate in fee simple in said lands at the time of executing the mortgage deed mentioned in the declaration, nor at the time of his death; and yet that they affirmed to the said *Increase* and *Elizabeth*, that he was at those times seised of such estate therein, and said *Increase* and *Elizabeth* believed the same. And that if the defendants did not know that the said *Dudley* was not seised of such estate in said lands at the time aforesaid, it was owing to their gross negligence, and failure to perform their duty as administrators of his estate.

This evidence was rejected by the judge, and the action was continued *nisi* for the consideration of the plaintiff's motion for its admission, and for judgment on the verdict.

At the following March term in *Suffolk*, the opinion of the Court was given upon the verdict by

SEDGWICK, J. If in this case we, or any of us, entertained any doubt, we should delay a determination; but as that is not the case, it has become our duty to pronounce judgment.

As to the motion for a new inquiry, we are all clearly of opinion, that the evidence offered and rejected was inadmissible. That evidence went directly to prove fraud in the defendants at the time of the contract, or such gross negligence on their part as would imply it. If this was true, an action on the case could be supported for that cause; whereas this is an action of covenant on a deed, nor does the record, in any part of it, allege or suggest any fact of the nature offered to be proved. In our opinion, it would have been utterly wrong, as a surprise on the defendants, to have permitted the evidence offered to have been given; (*b*) and, if possible, the

(*b*) [Vide *Jeffrey* vs. *Bigelow*, 13 *Wend.* 518. — *Dimmick* vs. *Lockwood*, 10 *Wend.* 142. — *Lord Sandos* vs. *Fletcher*, 5 *B. & Ald.* 835. — *Hopkins* vs. *Grazebrook*, 6 *B. & Cr.* 31. — *Walker* vs. *Moore*, 10 *B. & Cr.* 421. — *Bacon. Dam. D.* — *Fox* vs. *Macreth*, 2 *Cox*, 322. — *Macreth* vs. *Fox*, 4 *Br. P. C.* by *Toml.* 258 — *Greenwood* vs. *Wilkinson*, 1 *Car & P.* 625. — ED.]

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more manifestly so, as there was formerly a count in the declaration to this *effect, that is, charging the defend- [* 221] ants with this fraud, which count was afterwards withdrawn. The defendants could not therefore have formed a conception that such evidence would be offered at the trial; nor can it be supposed they could have come prepared to contest it.

The remaining question before us relates to the measure of damages.

The action was brought upon the covenant of warranty, considered as a personal covenant, tantamount to a covenant for a quiet enjoyment. It appears that the deed contains other covenants, which regard the soundness of the title, and the right of the defendants to convey. The Court was of opinion that the deed, as a conveyance, was inoperative; and consequently that the covenants relative to the title were broken at the time of the execution of the deed.

On this state of facts it is contended on behalf of the plaintiff, that the measure of damages is the value of the land at the time of the eviction, together with the expenses of defending against *Dudley's* suit; and on the part of the defendants, it is contended that the true measure of damages is the purchase money; that is, the sum expressed as the consideration in the deed, and the interest from the time; or at most that amount, together with the expenses of defending the lawsuit. And we are all satisfied that the defendants are right.

In the first place, the rule contended for by the defendants seems to be equitable, inasmuch as it will restore the full amount of what has been lost by a failure of the title. Again, covenants having been broken at the time of the execution of the deed, a cause of action immediately accrued. The real injury was then sustained, and the amount of indemnity for it precisely the money, which had been paid for a defective title. In such a case as this, if the grantee cannot enter into possession, he is entitled to demand immediately the money which he has paid; and if he receives it, it must be deemed a satisfaction for the injury. *If [* 222] there is delay, there must be interest on the amount of the purchase money, commensurate with the delay; and that interest the law deems a satisfaction for the delay. If the grantee enters into possession, the profits of the improvement are deemed equivalent to the interest; but as he may be compelled to account for those profits, and pay them over to the owner, he is for that reason entitled to demand the interest, with the purchase money, in an action upon his covenant. Moreover, if the action had been commenced on the covenants which respect the title, there is no doubt

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that the measure of damages would have been the purchase money with the interest. On those covenants an action might have been supported; and when the injury, the damages, and the contract are the same, can it consist with reason or justice, that the law should give to the plaintiff an option of varying his damages, as is the case here, more than tenfold, by commencing his action upon one covenant, from what they would have been, if commenced on another?

We are all of opinion that the plaintiff is entitled to recover the expenses, which have been incurred in defending against *Dudley's* suit; because we think those expenses are inseparably connected with the plaintiff's claim of indemnity; and it would be too much to demand of the grantees in such a case, that they should be holden to decide, at their peril, on the validity of a title, set up in opposition to that which the grantors undertook to convey. As an instance in point, to support the justness of this observation, we all remember that it was found no easy task to decide the controversy, which was the foundation of this action.

But we none of us think that the claim for the money paid for the assignment of the mortgage is well founded. Although the assignment of the mortgage, and the deed for the equity of redemption, were contemporaneous, yet they were perfectly distinct and independent of each other; and to the assignment one of the defendants was a perfect * stranger. And each contract was such as the parties were satisfied with, and on each received that security, with which they were contented If that security has proved, or shall prove, insufficient, it is a misfortune, not to be compensated by an innocent man, who had no connection with the transaction, by which the loss may have happened. — After what I have said, it cannot be necessary to add that in our opinion the plaintiff cannot recover for the money paid for the release of the widow's dower. (*c*)

] * 223 [

(*c*) [*Gore* vs. *Brazier*, 3 *Mass. Rep.* 523. — *Bigelow* vs. *Jones*, 3 *Mass. Rep.* 512. 4 *Kent*, 475, 3*d edit.* — ED.]

JOSEPH PIERCE *versus* STEPHEN FULLER.

One, in consideration of a dollar paid him, agreed by his deed not to run a stage on a certain road specified, under penalty of two hundred and ninety dollars the agreement was held valid, and the penalty mentioned was considered as the damages liquidated by the parties.

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PIERCE *vs.* FULLER.

THIS was an action of *debt*, in which the plaintiff declared that the defendant, by his obligation, under his seal, and for the consideration of one dollar, agreed not to run a stage between *Boston* and *Providence*, in opposition to the plaintiff's stage in the penalty of two hundred and ninety dollars; and averred that the defendant, in violation of his agreement, had run a stage between those two places, by which he had forfeited that sum, to recover which the action was brought.

To this declaration the defendant pleaded several pleas in bar.

First. That he hath not, since the sealing of the said obligation, run a stage in opposition, &c., and tenders an issue to the country, which is joined by the plaintiff.

Secondly. That at the time of making the said writing obligatory, he was, and for a long time before had been, engaged in the business of running stages from *Boston* to *Providence* as his occupation; and that the sum of one dollar in the plaintiff's declaration mentioned, as the consideration paid by him to the defendant for making and executing the said writing obligatory, was not a sufficient and adequate consideration to render the same good and valid in law to restrain him from pursuing his occupation aforesaid; wherefore he run stages on the said road after * making [* 224] and executing the said writing obligatory, as he well and lawfully might do; and this, &c.; wherefore, &c.

To this plea the plaintiff, in his replication protesting that one dollar is a sufficient consideration, &c., avers that before the making, &c., *viz.*, on the day of, &c., the defendant was the owner of an old stage-coach and one poor horse, both of the value of 190 dollars, and no more; which coach and horse the defendant was then using and employing as a part of the line, &c.; and it was agreed between him and the plaintiff, that the plaintiff should purchase of the defendant his said stage-coach and horse, and also all privileges, benefit, and profit which he had had and enjoyed, and which would accrue to the plaintiff from his becoming a proprietor in the said line, &c., and that the plaintiff should pay the defendant therefor the sum of 290 dollars; and that the defendant, in consideration thereof, would not, from that time, run any stage, &c.; that, in pursuance of the said agreement, the plaintiff purchased the said stage-coach and horse, together with all the privileges, &c., and the defendant made and executed the writing obligatory declared on; whereupon it became unlawful for the defendant to be concerned in the business of running stage-coaches on the said road in opposition to the line of stage-coaches in which the plaintiff was a proprietor; and this, &c.; wherefore. &c

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The defendant, in his rejoinder, traverses the said agreement, and tenders an issue to the country, which is joined by the plaintiff.

Thirdly. That long before, and at the time when, &c., the defendant was and had been engaged in the business of running stages from *Boston* to *Providence*, as his occupation; by reason whereof the said bond was void in law, being in restraint of trade and business; wherefore he did run stages, &c., as he well and lawfully might do; and this, &c.; wherefore, &c.

To this plea the plaintiff demurs generally, and the defendant joins in demurrer.

[* 225] * Upon the issues joined as aforesaid to the country the jury returned a verdict for the plaintiff upon the first, and for the defendant upon the second.

The cause was argued at this term by *Hastings* for the plaintiff, and *Richardson* for the defendant.

Richardson. The first and principal question for the attention of the Court in this action will be, whether the contract in this case was of such a nature as that the law will enforce it. In every case of this sort there ought to be a sufficient consideration to induce a man to renounce and give up his trade or calling, and such consideration ought to appear in the contract itself. (1) Here it appears that all the consideration pretended was merely the nominal one of a dollar, and that probably not paid, but introduced into the instrument by the scrivener as a formality. It is not contended that a promise of this particular kind, if made on reasonable consideration apparent, is not good.

But if the Court should incline to support this action, a second question arises, viz., whether the whole sum stipulated as a forfeiture shall be given the plaintiff, or only such damages as he shall prove himself to have sustained. On this point the defendant insists that the sum of 290 dollars was inserted as a penalty, merely to secure the performance of the agreement, and the real damages sustained by the breach; and is not to be considered in the light of liquidated damages. (2)

Hastings, for the plaintiff. A bond of this kind needs no consideration to be expressed, if the contract be in itself lawful; and that it is, all the cases agree. Here, however, a valuable considera tion is expressly acknowledged. (3) — The sum of 290 dollars is the damages assessed and liquidated by the parties; and if the

(1) *Mitchel* vs. *Reynolds*, 1 *P. Will.* 181.
(2) *Sloman* vs. *Walter*, 1 *Bro. Cha. Ca.* 418. — *Astley* vs. *Weldon*, 2 *Bos. & Pul.* 346 *Orr* vs. *Churchill*, 1 *H. Black.* 227.
(3) *Broad* vs. *Jolliffe*, *Cro. Jac.* 596. — *Davis* vs. *Mason*, 5 *D. & E.* 118.

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action lies, there can be no question that the plaintiff is entitled to judgment for that sum. The cases referred to for the defendant are of bonds in a penal sum, with a condition annexed for the performance * of articles, which are governed by [* 226] a different rule.

The action stood continued *nisi* for advisement; and at the following March term in *Suffolk*,

SEDGWICK, J., delivered the opinion of the Court.

If the obligation declared on in this case be against law, the plaintiff must fail in his action; if not, the defendant's third plea in bar must be adjudged bad.

Bonds to restrain trade in general are unquestionably bad, as tending to create a monopoly injurious to the public. But bonds to restrain trade in particular places may be good, if executed for a sufficient and reasonable consideration. And in this case, the defendant might restrain himself by his agreement from running a stage on the particular road between *Boston* and *Providence*, on a liquidated penalty, for a reasonable and good consideration. And if it does not appear whether the contract was or was not made on good consideration, so that the contract may be either good or bad, it is the *primâ facie* presumption of law that the contract is bad, because it is to the prejudice of trade and honest industry; — because the mischief to one party is apparent, and the benefit only presumptive; and because the apparent mischief is not merely private, but also public. Therefore all contracts barely in restraint of trade, where no consideration is shown, are bad. But in cases of a limited restraint of trade, where it appears from the special circumstances that the contract is reasonable and useful, shall be good And the consideration must always be shown, that the contract may be supported by the special circumstances, which induced the making of it. Of these circumstances the Court must judge; and if, upon them, it appears to be a just and honest contract, it will be maintained. (*a*)

From examining the pleadings in this case, all that can be collected respecting the contract is, that, before and at the time it was made, the defendant was in the occupation of running a stage on the road between *Boston* and *Providence*; * that [* 227] when the contract was made, the plaintiff either had set up, or contemplated setting up, a stage on the same road; and that

(*a*) [In order that a contract in restraint of trade may be valid, it must be partial reasonable, and for an adequate consideration. *Young* vs. *Timmins*, 1 *Cr. & J.* 331. — 1 *Tyrw.* 226. — *Leigh* vs. *Hind*, 9 *B. & Cr.* 774. — *Horner* vs. *Graves*, 7 *Bingh.* 743 — *Kemble* vs. *Kean*, 6 *Simon* 335. — *Gale* vs. *Reed*, 8 *East*, 79. — *Homer* vs. *Ashford*, 3 *Bingh.* 328. — ED.]

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in consideration of one dollar, paid by the plaintiff to the defendant, the latter agreed that he would not run a stage on that road, *in opposition to the plaintiff's stage*, on penalty of two hundred and ninety dollars.

The public appear to have no interest in this question. If the plaintiff did not run his stage, the defendant might run a stage; for it could not be in opposition to the plaintiff's stage. And it is indifferent to the public, which of these run a stage. It also appears from the contract, that the benefit to the plaintiff is not merely presumptive, but evident; as he must derive a certain advantage from excluding a rival stage from this road. But an inconvenience to the defendant from the contract is also apparent; for he quits his present occupation, which we ought to presume to be beneficial to him, as the plaintiff has stipulated for the forfeiture of two hundred and ninety dollars to be paid by the defendant, if he shall break the contract. To this inconvenience the defendant may voluntarily subject himself, for *volenti non fit injuria*. The contract, for aught that appears, was made fairly and without imposition; and a breach of it is manifestly a damage to the plaintiff.

The principal question then is, whether the consideration of one dollar is sufficient to support this contract. A distinction between *assumpsits* and bonds with penalty in restraint of trade was formerly adopted; the former being supported, because a judgment could give the plaintiff reasonable damages for the non-performance, while the latter were adjudged void, because the whole penalty was forfeited on a breach of the condition. (4) There is here no reason for the distinction; for on the breach of the condition of the bond, the obligee can recover only the damages he has sustained by the breach. Perhaps there was never any good reason for the distinction; for if the bond was executed for good consideration,
[* 228] the penalty ought to * have been considered at law as the liquidated damages for the breach.

The contract in the present case is not in the form of a bond with a penalty, but although unskilfully drawn, it is to be considered as a covenant with the damages liquidated by the parties, as a compensation for the breach, if the defendant should choose again to run a rival stage. (*b*)

The parties were competent in law to make a contract imposing

(4) 3 *Lev.* 241, *Clerke* vs. *The Taylors of Exeter.*

(*b*) [It was held, in *Smith* vs. *Dickenson*, 3 *B. & P.* 632, that the word "penalty" excluded the idea of liquidated damages. But see *Rolfe* vs. *Peterson*, 2 *Br. P. C. Toml.* 436. — *Jones* vs. *Green*, 3 *Y. & J.* 304. — *Crisden* vs. *Bolton*, 3 *Car. & P.* 240 — *Davis* vs. *Penton*, 6 *B. & Cr.* 222. — *Orr* vs. *Churchill*, 1 *H. Bl.* 227. — *Kemble* vs *Farren*, 6 *Bingh.* 141. — ED.]

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a limited restraint on the defendant's trade for the plaintiff's benefit, and without injury to the public. They were competent to determine on what consideration it should be made, and to liquidate the damages if it should be broken.

The consideration of one dollar is in law a valuable consideration. It would be sufficient to pass by sale the defendant's stage and stage horses, where no fraud or imposition was practised. The parties have considered it as reasonable and adequate; and the defendant, by honestly fulfilling his agreement, might have protected himself from the forfeiture.

But he has broken it, and he shall not be admitted to say, that although the contract was fairly and honestly made, and for a valuable consideration, to which he consented, the consideration was inadequate; that he made a bad bargain; and that, when the plaintiff has suffered by the breach of it, he shall be relieved from the terms to which he had voluntarily submitted.

There is an old case determined when contracts in restraint of trade were confined in narrow limits, in which the apparent consideration was as inadequate as that in the present case is supposed to be. It is the case of *Bragg* vs. *Tanner*, cited in *Broad* vs. *Jollyfe*, in *Cro. Jac.* 597. There the defendant, in consideration of ten shillings, promised the plaintiff to pay him a hundred pounds, if thenceforward he kept any draper's shop in *Newgate Market;* and the contract was adjudged good, and the plaintiff had judgment.

* It is the opinion of the Court, that the defendant's [* 229] third plea in bar is bad, and no sufficient answer to the plaintiff's declaration.

From the opinion now declared, it results that the issue tried in this case arising upon the second plea in bar was wholly immaterial. That plea merely alleges the defendant had, for some time before making the contract declared on, been engaged in running a stage between *Boston* and *Providence*, and that one dollar was not an adequate consideration to restrain him from pursuing that business. To this plea there is a replication, in substance, that other and farther considerations besides the one dollar were in fact given by the plaintiff to the defendant, to induce him to enter into the contract. Then follows a rejoinder negativing that fact, and an issue which it tenders is joined. This issue was found in favor of the defendant. But as the contract, from the terms of it, appears to be binding on the defendant, without further consideration than that expressed in the deed, it is of course immaterial whether there was, or was not, any further consideration than is expressed in the deed.

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Of consequence it appears, from the whole record, that the plaintiff is entitled to judgment.

JEREMIAH SHUTTLESWORTH *versus* JAMES NOYES AND OLIVER DOWNS, his Trustee.

Where one summoned as trustee had made a promissory note payable to the wife of the defendant, for a consideration arising wholly from her property, he was adjudged the trustee of the husband.

IN this case the only question made was, whether *Downs* should be adjudged the trustee of *Noyes* the defendant. — And as to this, the facts appearing from *Downs's* answer were, that he, after the marriage of *Noyes* with his wife *Martha*, now living, gave a note, not negotiable, payable to the said *Martha*, at a future day, which had not arrived at the time of the answer by *Downs*. The consideration of the note was partly a debt due to the said *Martha* before her marriage, and partly a sum arising on the distribution of the estate of her deceased father.

[* 230] * SEDGWICK, J., said in substance, that the Court had a strong desire to protect this demand against attachments made by the creditors of the husband, if it could be done consistently with established principles of law; but that it was very clear that a note payable to a *feme covert* is legally payable to the husband, and the property vests absolutely in him. He alone, during his life, has power to enforce payment or discharge the demand; and after his death, it would go to his executor or administrator, and not to the wife. It was therefore the opinion of the Court, that this demand was well attached by this process, and that *Downs* must be adjudged to be the trustee of *Noyes*, the principal defendant.

Chickering for the plaintiff.

Richardson for the trustee.

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WILLARD FAIRBANKS, Administrator, &c., *versus* CALVIN METCALF.

Of the effect of the delivery of a deed, and when it shall be considered as an escrow.

[Evidence is admissible to show that a deed was delivered subsequently to the date of it. — ED.]

IN a writ *entry sur disseisin*, the demandant counted on his own seisin as administrator of the goods and estate of *Asa Fairbanks*, deceased, intestate, and a disseisin by the tenant.

The tenant, with *James Adams*, admitted to defend, &c., plead the general issue, that *Metcalf* did not disseise, &c., which is joined by the demandant.

At the trial of this issue before *Sewall*, J., at the last March term in this county, the demandant gave in evidence a writ of attachment in his suit, as administrator, for a demand due to the estate of his intestate, against the said *Metcalf*, the writ being tested the 12th of January, 1810, with a return upon it dated 8 o'clock in the evening of the same day, of certain real estate, including the demanded premises, attached as belonging to the said *Calvin Metcalf*. The demandant, having recovered a judgment in the said * suit, sued out his execution thereon, and caused [* 231] the same to be levied upon the demanded premises on the 23d of May, 1810.

The defendants on their part relied on a deed and conveyance of the premises made by the said *Calvin Metcalf* to the said *James Adams*, respecting which the following circumstances were proved: —

In March, 1806, *Adams* being then a creditor of *Metcalf*, and surety for him in sundry notes and obligations given for his debts, it was agreed between them, that *Adams* should assume and become further liable for *Metcalf's* debts, to the amount of 2000 dollars in the whole. Thereupon *Metcalf* made and formally delivered the deed in question; but afterwards, according to the understanding and agreement of the parties, this deed was immediately placed in the hands of *Nathan Woodward*, one of the subscribing witnesses thereto, to be kept by him until a bond of defeasance could be executed on the part of *Adams*, or the said *Woodward* should be further directed by the parties. — At this time no statement was made, nor any adjustment ascertaining the amount of *Adams's* demands and responsibilities; but he afterwards went on to assume, and to become responsible as a surety, for other debts of *Metcalf*. The

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deed accordingly remained in *Woodward's* hands until the 10th of January, 1810, when *Adams* and *Woodward* went together to *Metcalf*, and, after some conversation respecting a bond of defeasance, which was made and destroyed, the parties agreed to have the deed acknowledged and recorded; and thereupon *Adams* received the deed of *Woodward*, and handed it to *Metcalf*, to have an acknowledgment taken and certified upon it. It was then about 8 or 9 o'clock in the evening of the 11th; and before the delivery of the deed to him, *Adams* exhibited a schedule of debts and responsibilities, which he had paid or in which he was liable for *Metcalf*, to the amount of 2536 dollars 61 cents; and there was evidence at the trial, to verify this schedule, in all the particulars of it.

[* 232] *The value of the premises conveyed did not exceed 2200 dollars, and by several witnesses it was estimated below that sum. The fact of the execution of a deed, in 1806, by *Metcalf*, was known to several of his creditors, at the time or soon afterwards. But it was not generally known; although there was no evidence that any particular secrecy respecting it was enjoined or observed. No change took place in consequence of the deed while it continued in *Woodward's* hands, respecting the possession or occupation of the premises conveyed; and there was evidence, that, in the course of that time, *Metcalf* offered the premises for sale, mentioning, however, that the proceeds were wanted, or would be applied to indemnify *Adams*. *Metcalf* had other real estate, not included in said conveyance.

The final delivery of the deed was occasioned, in part at least by the apprehension of the parties, that the demandant intended an attachment, and to break upon *Metcalf*, as it was expressed; and in consequence of the attachment, it was discovered that he had become insolvent, as to a large part of the demands existing against him. — The acknowledgment was taken by a justice of the peace at *Metcalf's* house before day-light on the morning of the 12th of January, 1810; and the deed was immediately taken to the registry of deeds, and is certified to have been received on record at half past 9 o'clock in the morning of the same day.

The judge was of opinion, that the deed in question had effect from the final delivery, acknowledgment, and registry of it in January, 1810; if it was then a *bona fide* deed, for a valuable and adequate consideration; which the jury might reasonably conclude from the evidence before them; and they found a verdict for the defendants, subject to the opinion of the Court upon the foregoing facts reported by the judge; the demandant moving for a new trial for the misdirection of the judge.

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*The cause stood continued upon the said motion, [* 233] and at this term was argued by *Richardson* and *Metcalf* for the demandant, and *Hastings* for the defendants.

Metcalf. After a deed of bargain and sale is enrolled, it cannot be averred by the parties, that it was delivered at a day subsequent to the date. (1) The analogy between the English statute of enrolments (*Stat.* 27, *H.* 8, *c.* 10,) and our statute of 1783, *c.* 37, respecting the registry of deeds, is so strong, that the same doctrine must prevail here. (2)

The object of both statutes was to give notoriety to alienations; and the same reasons, which estop the parties to a deed of bargain and sale in *England*, to show, after the deed is enrolled, that it was delivered contrary to its purport, operate in this state. Indeed the mischief of admitting such evidence is greater here than in *England*. For here lands are at all times subject to the payment of debts; so that creditors, as well as purchasers, might be deceived by the records.

The reason of this rule is not derived from that provision of the statute of enrolments, which requires the deed to be enrolled within a limited time; for at whatever time it is delivered, the enrolment must be made "within six months next *after the date.*" (3) So that showing a delivery after the date would not enable the parties to evade the limitation.

Nor are enrolments records of a higher nature than our registry. Although they are made in courts of record, yet they are without doubt distinct from what are commonly understood by records of court; as they formerly were here, when the clerk of the county court was *ex officio* recorder of deeds. It will not be pretended that the records of deeds were then of a higher nature than they now are in the register's office.

Nor is the reason because the party in *England* is estopped by his acknowledgment to deny his deed; (4) which is not the case here. For acknowledgment is not an essential *prerequisite of enrolment of a deed. Its execution [* 234] may be proved by witnesses. (5) And no distinction is taken, as to this point, between the cases. The reason given applies with equal force to both.

But if the Court should be of opinion, that the defendants might well show a delivery of the deed after its date, still the deed took

(1) *Owen*, 138, *Howard's case.* — 1 *Leon.* 183, *Holland & Franklin's case.* — *Com Dig. tit. Bargain and Sale, B.* 10. — 2 *Rep.* 4, *Goddard's case.*
(2) 2 *Inst.* 670. — 4 *Mass. Rep.* 541, *Pidge* vs. *Tyler & Al.*
(3) 2 *Inst.* 674. (4) 1 *Salk.* 280, *Smartle* vs. *Williams.*
(5) 1 *Salk.* 389, *Taylor* vs. *Jones.*

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effect from the delivery in March, 1806. The report of the judge states that it was then formally delivered; and a deed operates from the delivery.

This is conclusive, unless from the evidence it appears that it was then delivered as an escrow. This is to be ascertained from the testimony of the witnesses, and from inspection of the deed. — As to this point, the case of *Wheelwright* vs. *Wheelwright* (6) compares with the case at bar; except that it does not there appear but that the deed was acknowledged at the same time it was executed. But after a deed is acknowledged, it takes effect from the delivery. (7)

After enrolment a deed passes from the delivery. (8) A strong case to show this is cited by *Littleton arguendo* in *Flower* vs. *Baldwin* (9) — "If a bargainee hath a wife, and dies, and afterwards the deed is enrolled, the wife shall have dower, as was resolved for the wife of Baron *Freville*."

That a deed after acknowledgment passes by relation from the delivery, is a necessary effect of that clause of the statute of 1783, which provides that when a grantor refuses to acknowledge, is removed out of the government, has gone beyond sea, or is dead, before acknowledgment, — then proof of the execution of the deed, in manner there pointed out, "shall be equivalent to the party's own acknowledgment."

The delivery in this case was to the party; and therefore not an escrow, even if it had been so intended. (10)

Woodward must be considered as trustee of *Adams*; and had the latter obtained the deed at any time after its execu-
[* **235**] tion * and delivery, it would have been the grantor's deed, and *Adams* would have had a complete title to the land against *Metcalf* and his heirs. (11)

Further, if the deed took effect from the first delivery, it was fraudulent and void as to the creditors of *Metcalf*; because it was on a trust between the parties, and possession did not accompany and follow the deed. (12)

Again; if the deed took effect from the final delivery, still it was fraudulent and void, as against *Metcalf's* creditors. The report of the judge states that *Adams* "*had become responsible as surety*," and

(6) 2 *Mass. Rep.* 453. (7) 1 *Cranch's Rep.* 239. (8) 2 *Inst.* 674. (9) *Cro. Car.* 217. (10) *Co. Lit.* 36. — 9 *Rep.* 137, *Thoroughgood's case.* — *Cro. Eliz.* 520, *Whyddon's case.* — *Ibid*, 884, *Williams* vs. *Green.* — *Cro. Jac.* 85, *Blunder* vs. *Wood.* — *Hob* 246, *Holford* vs. *Parker.* — 6 *Mod.* 218, *Bushell* vs. *Pasmore.*

(11) *Wheelwright* vs. *Wheelwright.*

(12) 3 *Rep.* 80, *Twyne's case.* — 2 *Vern.* 261, *Hungerford* vs. *Earle.* — 2 *D. & E* 594, *Edwards* vs. *Harben* — 1 *Cranch's Rep.* 310, *Hamilton* vs. *Russel.* — *Roberts on Fraud Conv.* 554, 555.

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that some part of the debts, for which *Adams* had become responsible, have since been satisfied by a levy on *Metcalf's* property. It does not appear how much *Adams* had paid. That the parties intended that *Metcalf* should pay some part of the debts, for which *Adams* had become responsible, is evident from the bond of defeasance, and from the value of the land conveyed being less than the amount, for which *Adams* had become responsible.

In this state of the business, it was practicable for *Adams* to have gotten the whole estate conveyed to him for nothing, and for a part of *Metcalf's* creditors to have been defrauded of their demands. It is humbly presumed, then, that the direction of the judge was not warranted by the evidence, *viz.*, that the jury might reasonably presume that the deed was *bonâ fide*, and for a valuable consideration.

Hastings. The deed had its effect only from its delivery in January, 1810, when it was regularly acknowledged, and immediately registered. The formal delivery in March, 1806, had no operation, since it was previously understood and agreed that it should not remain with *Adams*, but forthwith pass into the hands of a trustee, who was to retain it in possession, until a bond of defeasance should be executed, or further directions, as to its disposal, be given by the parties jointly. It was, then, to all intents, an escrow in *Woodward's* hands; and neither of the facts having occurred before January, 1810, by which its situation and nature were to be changed, it continued an escrow, and inoperative,
*during the whole intermediate time. There was no [* 236]
fraud in the transaction; for, until the morning of the
12th of January, 1810, the estate conveyed was liable to attachment at the suit of any of *Metcalf's* creditors. And when the deed finally had its effect, *Adams's* demands much exceeded the value of the land conveyed; and this accounts for the destroying of the defeasance.

The English decisions, that a delivery of a deed of bargain and sale cannot be averred as taking place after the date, have arisen from the provision of the statute of enrolments, that such a deed must be enrolled within six months from its date; and they have no application here, where by law a deed may be registered at any time, and in the interim is good against the grantor and his heirs, and all after purchasers with notice. Besides, the question of fraud was very properly referred to the jury, who have negatived it, although it was strongly urged upon them by the demandant's counsel at the trial. If the Court shall think, as there seems abundant ground to think, that the verdict is according to the justice of the case, under all the circumstances, they will not send it to a new trial, by which there is a chance that injustice may be done.

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Richardson, in reply. Although *Metcalf's* creditors were not actually delayed and defrauded by the existence of this deed from 1806 to 1810, yet they might be deceived by *Metcalf's* continuing in possession, and thus possessing a false credit, while *Adams's* demands were accumulating upon the faith of the deed. It was fraudulent, again, as it was at last delivered; inasmuch as those creditors, to whom *Adams* was responsible, might obtain payment from other parts of *Metcalf's* estate, which it appears that he had. *Metcalf* may, for aught that appears to the contrary, before this, have discharged all those responsibilities; and then the deed forms a secret trust and confidence for his benefit, and to the defrauding of his other creditors; or *Adams* will retain the land, without consideration and against conscience, to his own benefit.

[* 237] * After the argument, the action stood continued *nisi* for advisement; and at the following March term in *Suffolk*, the opinion of the Court was delivered as follows, by

SEDGWICK J. This is a dispute between two honest men, both claiming to derive a title to the land in controversy from *Calvin Metcalf*, which, it is agreed, once, and until a title vested in one of the parties in controversy, belonged to him. These parties are *Fairbanks*, the demandant, and *James Adams*, who is admitted by consent to defend the action.

The demandant claims under the levy of an execution, regularly made on the land in controversy; which was attached on the 12th of January, 1810, at 8 o'clock *in the evening*. *Adams* claims under an absolute deed in fee simple of the same land, duly acknowledged and recorded on the same day; which deed was received by the register at half past 9 o'clock *in the morning*.

As the title under the deed was completed previous to the attachment, it must be effectual, provided the deed was a good deed, valid as against the creditors of *Metcalf*; and, on the contrary, if that deed is fraudulent, the demandant is entitled to recover.

The deed was made and dated in March, 1806. At that time *Metcalf* was indebted to *Adams*, who was also surety to several of *Metcalf's* creditors for his debts; and it was intended that the deed, although absolute in form, should operate as a security for the debts due to *Adams*, and for his responsibilities for *Metcalf*. For this purpose it was to be put into the hands of a third person, to be kept by him until an adjustment should be made, and a bond of defeasance executed by *Adams*; or until further directions should be given by the parties. In pursuance of this agreement the deed was made, and *in form* delivered to *Adams*; but immediately afterwards, *according to the understanding and agreement of the parties*, it was placed in the hands of *Woodward*, one of the subscribing witnesses

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So the business continued until the 11th of January, 1810, *when a final adjustment between *Adams* and *Metcalf* was made; on which it appeared that *Adams* had paid, and was liable to pay, for *Metcalf*, a sum more than the value of the land conveyed. At that time the deed was redelivered by *Woodward* to *Metcalf*, by him delivered to *Adams*, and on the next day acknowledged and registered, as has been mentioned. [*238]

By the attachment referred to in the report of the judge, it appears that the debt due to the demandant was an existing debt at the time of making the deed; and if *Adams* can avail himself of nothing but what then took place, if the delivery of the deed was absolute, and if what has since taken place has not given validity to the deed, it is manifest that it must be considered as fraudulent and void, as against the extent of the demandant's execution; because *Metcalf* continued in possession; because there was a trust and confidence between the parties; and because it was intended that the deed should operate differently from its import — that it should be conditional, and not absolute.

On the part of the demandant it is contended, that the delivery in 1806 was absolute, being made to the grantee; — and on the part of *Adams*, that that delivery was controlled by the manifest intent of the parties, and that the deed was, accordingly, then delivered as an escrow.

That the delivery of a deed should operate as an escrow, it is necessary that it should be made to a stranger, and not to the party; for if one make a deed, and deliver it to the party to whom it is made, as an escrow upon certain conditions, in such case, let the form of the words be whatever it may, the delivery is absolute, and the deed shall take effect presently as his deed; and the party to whom it is delivered, is not bound to perform the condition; for *in traditionibus chartarum, non quod dictum, sed quod factum est, inspicitur.*

The question then is, whether, from the facts appearing in this case, the delivery of the deed in 1806 was made to *Woodward* or to *Adams*. If to the former, it was an escrow; — *if to the latter, it was absolute, and the deed then took effect. [* 239]

There can be no doubt what the intention of the parties was. It was their intention and agreement that the deed should operate as an escrow. The deed was not at that time to become absolute. It was not *then* to go into the possession of *Adams*. But, on the contrary, it was to be placed in the hands of a third person, by him to be kept until an adjustment should be made between the parties, and a defeasance executed by *Adams*, or until further directions

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should be given by the parties. When, however, *Metcalf* sealed it, he delivered it into the hands of *Adams*; but it was immediately afterwards, *in conformity to the understanding and agreement of the parties*, placed in possession of *Woodward*. Now, the plain sense and justice of the case requires that the deed, while in the hands of *Adams*, should be considered as *in transitu* to the possession of *Woodward*, — as much so as if words to that effect had been pronounced by *Metcalf* at the time. The agreement had been *previously* made, and *subsequently* the delivery in conformity to it; and I think that, according to the facts, *Adams* is to be considered as merely the instrument or agent of *Metcalf*, to deliver the deed to *Woodward*, according to the intention and agreement of the parties, as an escrow.

One of the requisites to constitute a deed is the delivery. If the delivery of this deed in 1806 was merely as an escrow, as the conditions on which it was delivered were never performed, it was of no more force, than if *Metcalf* had made it, and had never delivered it at all. The consequence of this is, that when it was, in 1810, redelivered by *Woodward* to *Metcalf*, it was precisely as it would have been, if *Metcalf* had always retained it in his possession. It had no validity. It was competent to him to destroy it; or he might do what he did, — deliver it; and in that case, like other deeds, it took effect from its delivery. And as the jury have found that the deed was made *bonâ fide*, and for a valuable
[* 240] and adequate consideration, (and indeed * there does not appear to have been any evidence from which the jury could have drawn a different conclusion,) the consequence is, that by the acknowledgment and registry of the deed, previous to the attachment by the demandant's writ, the title of *Adams* to the demanded premises is proved.

There is no doubt that, in this commonwealth, the delivery of a registered deed, subsequent to the date of it, may be proved, whenever the facts will authorize, and the justice of the case requires it. The authorities in *England* which have gone on the principle that, in the case of an enrolled deed of bargain and sale, the parties should not be permitted to show that the delivery was on a day subsequent to the date, were influenced from the wording of the statute of enrolments, which requires that the deed should be enrolled within six months from the *date*.

Judgment on the verdict.

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ELIJAH WILLIAMS AND ANOTHER, Plaintiffs in Equity, *versus* JAMES BRACKETT.

A sheriff cannot be admitted, in a suit between other parties, to change the description of land in his return of an attachment, made by him in a former action, so as to make the description apply to other lands of the debtor.

THE plaintiffs, by their bill in equity, claim a right to redeem and have possession, &c., of two third parts of a tract of land in *Quincy*, in this county, bounded, &c., and say that the premises in question were mortgaged by *Ebenezer Vezey* to *James Brackett*, the defendant, on the 21st of March, 1804, to secure the payment of 1500 dollars and interest; and again on the 13th of January, 1806, to secure the payment of 486 dollars 69 cents, and interest; in both which mortgages the premises are expressed to be "the same land, two thirds of which were devised to the said *Ebenezer* in remainder by his father, *Ebenezer Vezey*, deceased." — And the plaintiffs aver an assignment to them by the said *James Brackett*, on the 21st of October, 1806, of the said second mortgage, in consideration *of the said principal sum of 486 [*241] dollars 69 cents paid therefor by the plaintiffs, and a release to them by the said *Ebenezer Vezey*, the mortgagor, of all his right of redemption, for a valuable consideration paid him by the plaintiffs on the 19th of March, 1807; and that on the 3d of March 1810, they tendered to the said *Brackett*, the defendant, 2000 dollars for the payment and discharge of the said first mortgage, being within three years after he had possession of the said mortgaged premises.

The defendant, in his answer, sets forth an attachment of the said *Vezey's* equity of redemption, made on the 16th of April, 1805, by force of a writ of attachment brought and prosecuted at the suit of *Stephen Brigham* and others, and an execution issued on a judgment recovered by them against the said *Vezey*, the mortgagor; and avers the said execution to have been levied on his said equity of redemption in the mortgaged premises on the 28th of January, 1806; which, after the requisites of the law in that particular had been pursued, was sold to and purchased by the defendant, at a public auction, on the 31st of March, 1806, for the sum of 327 dollars, and was conveyed to him by *Joseph N. Arnold*, a deputy sheriff, &c., on the 2d of April, in the same year. And the defendant avers that on the same day he entered into possession of the mortgaged premises, with the consent of the mortgagor; and de-

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nies any right of redemption in the plaintiffs, and also the sufficiency of their tender, because not extending to the sum paid for the equity of redemption purchased at the sheriff's sale; if at the time of the said tender the plaintiffs had any right of redeeming, &c.

The two mortgages being admitted by the pleadings, the assignment by the defendant to the plaintiffs of the second mortgage was proved at the hearing had before *Sewall*, J., at the last March term in this county; and the defendant admitted the tender, and the sufciency of it to discharge the first mortgage, with all disbursements, &c. — The defendant then gave in evidence the return of the said *Joseph N. Arnold* upon the said writ of attachment,

[* 242] *in these words: "*Norfolk, ss.* 16th April, 1805. I attached all the right, title, and interest, which the within-named *Ebenezer Vezey* has in and to the estate of *Sarah Vezey*, late of *Quincy*, deceased, and left him a summons," &c., and moved to have the said *Arnold* sworn and examined, suggesting that he could explain the said return, and prove that he in fact attached the right of the said *Vezey* in the mortgaged premises.

This motion was overruled by the judge; the defendant admitting that the land mortgaged came to the said *Ebenezer Vezey* from his father, and that the said mortgagor had, at the time of said attachment, other real estate situate in *Quincy*, which came to him from *Sarah Vezey*, deceased.

Upon this evidence the judge was of opinion that the plaintiffs were entitled to redeem, and to have possession of the mortgaged premises; — but the defendant excepting to this opinion, and to the rejection of his motion, the further hearing was postponed, to have the decision of the whole Court on the case as reported.

Accordingly, at the succeeding March term in *Suffolk*, *Parker*, of counsel for the defendant, solicited the attention of the Court to the cause, contending that the plaintiffs had no right to redeem, without paying, in addition to the amount due on the first mortgage, the sum of 327 dollars, paid by him for the equity of redemption dependent on the first mortgage, and interest; and to entitle him to this claim, renewed the motion made at the former hearing, that the deputy sheriff *Arnold* should be admitted on oath to explain and amend his return on the writ of attachment served by him, the mistake in the return being merely a clerical one.

But the Court were all of opinion with the judge, who sat at the hearing, that the officer could not be admitted to explain, or rather alter, his return in the manner proposed, and determined that the plaintiffs had right to redeem the mortgaged premises, agreeable to their bill; the parties to be heard in chancery at the present term.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF MIDDLESEX, OCTOBER TERM, 1811, AT CAMBRIDGE.

PRESENT:

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. THEODORE SEDGWICK, }
HON. SAMUEL SEWALL, } JUSTICES.
HON. ISAAC PARKER, }

THOMAS NICHOLS *versus* WILLIAM WALTER AND OTHERS, Executors of William Walter, deceased.

The rule established, that, in an action upon a covenant of seisin, the plaintiff shall recover only the money paid for the land and interest, applies to actions brought upon conveyances of land in other states, as well as to conveyances of land in this commonwealth.

THIS action is covenant broken, in which the plaintiff declares on a deed made by *Andrew Oliver*, now deceased, and *Mary*, his wife, and *William Walter*, now deceased, and *Lydia*, his wife, the said *Walter* having survived the said *Oliver*. The deed was executed September 29, 1792, and purported to be a sale by the grantors to the plaintiff in fee, for the sum of 18 dollars 67 cents, of a tract of land in the town of *Deering*, in the state of *New Hampshire*, thus described, *viz.*, "that part of interval lot numbered ten, being on the

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east side of *Contookook* River, agreeably to the original plan, and which was bought by *Benjamin Lynde* of *John Quigley*, containing by estimation fifty acres, more or less." — And the plaintiff avers that in and by said deed the said grantors *Andrew* and *William* covenanted with him, his heirs and assigns, that they [* 244] and their wives in their right * were the lawful owners of the premises; that they had full right to sell and convey the same to the plaintiff in fee simple; and that they would warrant the same to him and his heirs against all lawful claims. — The plaintiff then assigns the breaches in this manner — that the grantors had right to be seised of the premises, but had no right of entry thereinto; and so had no right to sell and convey the same to the plaintiff in fee simple; — and further, that the plaintiff afterwards, on the 3d of September 1793, by his deed of that date, had sold the premises to *Ebenezer Newman*, and in and by the same deed covenanted with the said *Newman*, that he was the lawful owner of the premises, and had good right to sell and convey the same to him; that the said *Newman* afterwards, having been expelled and evicted therefrom by due course of law, prosecuted his action against the plaintiff for the breach of his said covenants, and in such action recovered judgment against the plaintiff for 500 dollars damages, and 55 dollars 49 cents costs of suit.

The defendants pleaded that the deed declared on was not the deed of the said *Oliver* and *Walter*, deceased; which issue was joined.

At the trial of this issue before *the Chief Justice*, at the sittings here after the last October term, the execution of the deed was agreed, and the only question remaining was the rule, by which the plaintiff's damages were to be assessed. — The plaintiff then, to prove his damages, offered in evidence an attested copy of a deed, executed by him to said *Newman*, bearing date September 3d, 1793, which deed, for the consideration of 133 dollars 33 cents, purported to convey to said *Newman*, in fee, "a certain piece of land in *Deering*, being part of the interval lot *No.* 10, in the original plan, and is bounded, beginning at the east bank of *Contookook* River, at a tree marked on the south line of *No.* 9, and from thence running east 124 rods to a tree marked, thence north 39° east 130 rods to a tree marked, thence north 9° east 20 rods to a tree [* 245] marked, thence * west 166 rods to the river aforesaid, thence up said river to the bounds first mentioned, containing 100 acres, more or less, agreeably to the original plan;" — and the said deed contained the covenants between the said *Nichols* and the said *Newman* which are above recited in the plaintiff's declaration. — The admission of this deed in evidence was objected

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to by the defendant; but the objection was overruled, and the deed was read. —The plaintiff then offered in evidence a judgment of the Superior Court of Judicature of the state of *New Hampshire*, by which the said *Newman* recovered against the plaintiff the sums mentioned in the declaration for the breach of the plaintiff's covenants in a deed made by him to *Newman*, purporting a conveyance of the land last above described. — The defendant objected to the admission of this evidence, not on account of any defect in the authentication of the record, but because it did not appear to relate to the same land described in the plaintiff's declaration; but the objection was overruled, and the copy admitted. — There was no evidence given to the jury, to show that the lands described in the plaintiff's deed to *Newman*, or in *Newman's* judgment against him, were the same lands described in the plaintiff's declaration; unless such evidence resulted from the same deed and judgment. — The *Chief Justice* directed the jury, that, in assessing the damages, they ought to consider as a reasonable measure, the consideration money paid by the plaintiff, with the interest thereon; and the jury assessed the damages accordingly. — For this direction the plaintiff moved for a new trial, and the action stood over to this term for the consideration of that motion.

And now *Bigelow*, for the plaintiff, insisted that the case furnished sufficient evidence that the land, which the defendants' intestate conveyed to the plaintiff, was the same which was conveyed by the latter to *Newman*, and for the plaintiff's defect of title, in which *Newman* had recovered five hundred dollars from him. The plaintiff, having suffered damage to that amount, by reason of the falsity of * the covenants in the deed of the de- [* 246] fendants' intestate to him, is, on every sound principle of law and equity, entitled to an indemnity from the defendants. No technical rules ought to stand in the way of such indemnity.

As this land is situate in *New Hampshire*, the contract is to be supposed to be made there, and then the laws of that state ought to govern in its construction. But by the laws of *New Hampshire*, the plaintiff, in an action upon a covenant of seisin, is entitled to the value of the land at the time of eviction. So it was adjudged in *Newman's* case, who gave but 133 dollars 33 cents for the land, yet had 500 dollars awarded him.

But by the Court. This case cannot be distinguished from those heretofore decided. The covenants were broken when the deed was executed. The rule is settled, and cannot be shaken, that in every such case the rule of damages is the consideration money paid for the land, and interest from the time of payment. Let

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judgment be entered upon the verdict, with interest as additional damages, and costs.

Fuller for the defendants. (*a*)

(*a*) [Vide *Sumner*, Administrator, vs. *Williams & Al.*, *ante*, 162. — ED.]

JONATHAN BROOKS *versus* EPHRAIM COOK AND JAMES BARRETT, HIS TRUSTEE.

An administrator cannot be holden as the trustee of a creditor of the estate of his intestate.

THE question in this case was, whether *Barrett* was by law liable to be adjudged the trustee of the defendant. Concerning which question the facts were, that *Barrett* had, at the time of the service of the writ upon him, no goods, effects, or credits of *Cook* in his possession, excepting as he, *Barrett*, was administrator of the goods and estate of *Peter Barrett*, deceased; that, previous to the death of the said *Peter*, the defendant *Cook* had commenced a suit against him, to recover the value of certain hides, which suit was pending at the time of the trustee's answer; and that the estate of the said *Peter Barrett* was insolvent.

[* 247] * *Hoare*, for the trustee, argued that an administrator, inasmuch as he derived his authority from the law, is like a public officer, concerning whom this Court has repeatedly decided that he cannot be holden as trustee of one who has claims upon him in his official capacity. (1) One inconvenience is peculiar to the case of an administrator of an insolvent estate. While he is under attachment as the trustee of a creditor of the estate, the final adjustment and distribution of the estate is delayed, to the injury of all the other creditors. The funds in the hands of an administrator are frequently the proceeds of real estate sold by him, under a license of court. Surely these proceeds cannot be considered as *goods*, *effects*, and *credits intrusted to and deposited in the hands* of the administrator by a creditor of the estate.

Dana, for the plaintiff, contended that an administrator was truly the debtor of a creditor to his intestate, and as such was liable to be holden by this process. The inconvenience alluded to

(1) *Wilder* vs. *Bailey*, 3 *Mass. Rep.* 289. — *Chealy* vs. *Brewer*, 7 *Mass. Rep.* 251.

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as arising in the probate office, is not so great as the depriving a plaintiff of the remedy which the law has given him; nor is it greater than the case of one who, by the terms of his contract, is entitled to a long credit. In that case the process is continued until the time of payment arrives. So here the proceedings may be stayed until *Cook's* action is decided, and his dividend ordered by the judge of probate. This will operate a much less inconvenience, than by discharging the trustee in this case, to deprive the plaintiff of a remedy against his debtor's effects and credits in the hands of an administrator.

Per Curiam. No person deriving his authority from the law, and obliged to execute it according to the rules of law, can be holden by process of this kind. We have determined this in the case of public officers, and the reason of those decisions applies with equal force to the case of an administrator. Let the trustee be discharged.

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* JOHN WALKER *versus* ABEL WINN.

It is libellous and actionable to write of one, "*I did observe* J. W. *put in a vote for lieutenant governor very soon after the poll was opened, and when not more than ten or twelve votes had been put in; and a few minutes before the votes were all taken, I saw* J. W. *put in a second vote for lieutenant governor*" — even though *J. W.* was not present at the election, or though no such election was held.

THIS was an action of the case for defamation, and for a libel. The declaration contained two counts. The first, after stating the plaintiff's good name, &c., and the defendant's knowledge thereof, states that the defendant, intending to hurt the plaintiff in his said good name, &c., and to subject him to the pains and penalties provided by the laws of this commonwealth for regulating elections, did at a legal town-meeting of the inhabitants of *Burlington*, in this county, held on the first Monday of April, then last past, at said *Burlington*, for the election of governor, lieutenant governor, and senators of said commonwealth, in the presence and hearing of divers good citizens of the commonwealth, falsely and maliciously publish the following false, scandalous, and defamatory words of and concerning the plaintiff, viz. "*Major* Walker," (meaning the plaintiff,) "*you have put in two votes for lieutenant governor*," (meaning into the box or poll, which was then and there held and kept open by the selectmen of said *Burlington*, wherein to receive the votes for lieutenant governor of

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said commonwealth at said election;) "I" (meaning himself, the said *Winn*) "*will swear to it;*" — by the speaking of which false, &c., words by the said *Winn*, the plaintiff has suffered great injury in his good name, &c., has been exposed to a public prosecution, has suffered great distress in his mind, and has been put to great cost and trouble in vindicating and defending himself, and has been otherwise greatly injured. — The second count alleges that the defendant, thereafterwards, on the 20th of June current, with the malicious contrivance and design, and for the wicked purpose aforesaid, did compose, write, print, and publish, in the sight and hearing of divers good people of said commonwealth, a scandalous and infamous libel, of and concerning the plaintiff, wherein and whereby the said *Winn*, among other things, falsely and scandalously wrote, printed, affirmed, and declared, of and concerning the [* 249] plaintiff, the following false, scandalous, * and defamatory words, that is to say, "*I*" (meaning himself, the said *Winn*) "*did observe Major* John Walker" (meaning the plaintiff) "*put in a vote for lieutenant governor,*" (intending into the box which was kept and held by the selectmen of said *Burlington* for the receipt of votes for lieutenant governor, as aforesaid, at the election aforesaid,) "*very soon after the poll*" (meaning the box) "*was opened, and when not more than ten or twelve votes had been put in,*" (meaning into the said box;) "*and a few minutes before the votes were all taken, I*" (meaning himself, the said *Winn*) "*saw Major* Walker" (meaning the plaintiff) "*put in*" (meaning into the said box) "*a second vote for lieutenant governor;*" thereby meaning and intending that the plaintiff had knowingly put and given in to the selectmen aforesaid, at the said election, more than one vote for lieutenant governor of said commonwealth; whereas in fact and in truth the plaintiff had not, and did not, at the election aforesaid, put into the said box, or otherwise give in to the selectmen of said town, more than one vote for lieutenant governor of said commonwealth, or for any other officer, of which the said *Winn* was then and there well knowing; — by the writing, printing, publishing, and declaring of all which false, scandalous, and defamatory words by the said *Winn* as aforesaid, the plaintiff has greatly suffered in his good name, fame, and credit; has been exposed to a public prosecution; has been greatly distressed in his mind; has been put to much cost and trouble to vindicate himself; and otherwise greatly injured. To the damage of, &c.

The defendant pleaded, 1st. the general issue, which was joined.

2d. In bar to the first count, that on the day when, &c., he, the said *Winn*, was, and long before had been, one of the selectmen of said *Burlington*, duly elected and qualified to serve in that office,

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and the said town-meeting being duly called and legally opened for the purposes in the said first count supposed, the qualified voters of said *Burlington*, * being called upon [* 250] to give in their votes, did then and there put their votes into the box or poll appropriated to votes for lieutenant governor: — And the said *Winn*, being so a selectman, and presiding at said meeting, and judgment of the proceedings therein, did, in conformity to law, and the statutes in such case made and provided, together with *John Woods* and *Joseph M'Intire*, the other selectmen of said *Burlington*, regulate said meeting, and in conformity to his duty did observe and attentively inspect the conduct of the various voters then and there assembled for the purposes aforesaid; and the plaintiff, being a qualified voter of said *Burlington*, attended said meeting; and the said *Winn*, being so as aforesaid attentive to, and observant, of the conduct of the several voters then and there assembled, did suppose and verily believe that the said *John* did then and there put into the said box two votes for lieutenant governor, contrary to law and the form of the statute in such case made and provided; whereupon the said *Winn*, then and there, in the presence of all the citizens assembled at said meeting, did speak and publish, of and concerning the plaintiff, the said several words in the first count of said declaration mentioned, and thereby supposed to have been spoken and published by him, the said *Winn*, as he lawfully might, and was in duty bound to do; and this he is ready to verify. Wherefore, &c.

To this plea the plaintiff demurred specially, assigning the following causes of demurrer, *viz.*, 1. Because the said *Winn*, in his said plea, does not affirm that the plaintiff did put in two votes, but only that he, the said *Winn*, believed and supposed so, which is not traversable. 2. Because the said *Winn*, in his said plea, does not affirm that the speaking of the words in his said plea mentioned is the same speaking in said declaration mentioned. 3. Because said plea does not deny nor justify the speaking of said words 4. Because said plea is informal, &c.

The defendant joins in the demurrer.

* 3. In bar to the second count, as to the writing, [* 251] printing, &c., of the words therein mentioned, the said *Winn* says that before the writing, printing, affirming, and declaring the said several words of and concerning the plaintiff, he, the plaintiff, at said *Burlington*, on the 27th day of May, then last past, did, with a view and intention to hurt and ruin the character and reputation of the said *Winn*, and with the wicked and malicious intent of destroying the usefulness of him, the said *Winn*, as a selectman of said *Burlington*, and with intent to publish a false account of the

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aforesaid election, wickedly, falsely, and maliciously write, print, affirm, and declare, of and concerning the said *Winn*, the following false, scandalous, and malicious words, *viz.*:—

"To the public. — Whereas *Abel Winn*, one of the selectmen of *Burlington*, at said *Burlington*, on the first Monday of April last, publicly accused the subscriber of giving in two votes for lieutenant governor, and the subscriber then and there publicly and on his honor denied the charge; but willing and anxious to have a public and legal investigation of the affair, the subscriber informed said *Winn* that he would allow him a reasonable time to bring the charge before the public in a legal form; which if he should neglect to do, the subscriber would take such measures, as the duty he owed himself, his family and friends might require, and the laws of his country would justify. Hitherto the subscriber has kept silence, as well from regard to his promise to said *Winn*, as from a conviction of the inadequacy of this mode of defence against a charge, which, if well founded, ought before this time to have brought him before the proper tribunal of his country, to answer for a violation of one of her dearest privileges. But more than six weeks having elapsed, during which time the Supreme Judicial Court having held its sitting in the county of *Middlesex*, in which county the subscriber lives, and the said *Winn* having
[* 252] neglected * to make complaint to the grand jury on the subject; — as the subscriber verily believes, justice to his own character, as well as a due regard to public opinion, compel him to adopt this method to clear himself from the base calumny. He does not hesitate to say he had a decided preference in the two candidates, and as every freeman ought to do, made use of fair and honorable means to secure the election of his favorite; but he solemnly declares, that no consideration whatever could have induced him so far to deviate from the path of honor and rectitude, as to have been guilty of the mean artifice alleged against him by the said *Winn*, and that he conscientiously believes that the declaration, thus vilely and falsely made, originated from party views and personal prejudice. *John Walker.* — *Burlington*, May 23d, 1807."

Wherefore he, the said *Winn*, in justification of his own injured character, and in answer to the above false, scandalous, and malicious words, so written, &c., did, at *Burlington* aforesaid, on the 20th day of June aforesaid, and with the intent to give a true and correct account of the proceedings at said election, write, print, and declare, of and concerning the plaintiff, among other things, the said several words in the said second count of the said declaration mentioned, and thereby above supposed to have been written, &c., by the

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said *Winn*, of and concerning the plaintiff, as it was lawful for him to do for the cause last aforesaid. And this he is ready to verify. Wherefore, &c.

To this plea there was a general demurrer, which was joined.

The general issue having been tried, and a verdict found for the defendant on the first count, and for the plaintiff on the second count, the cause came on to be argued on the demurrer to the second plea in bar, by *Bigelow* for the plaintiff, and *Dana* and *Prescott* for the defendant, at the last October term in this county, and again by the same counsel at the present term.

* *Bigelow* argued that the paper published by the [* 253] plaintiff, and recited in the second plea, was not libellous; but whether libellous or not, it is no justification of the libel charged on the defendant. One libel cannot thus be set off against another, and the defendant in his plea does not deny the falsity of his libel. (1)

Dana did not express great confidence in the plea as a bar to the action, though some points of it were very pertinent as a defence. A selectman is, by the constitution, made the presiding officer at our state elections, and sits in some sort as a judge. He is bound to see that no elector puts into the box more than one ballot. When he believes that such a fact is about to take place, it is his duty to prevent it; and when he believes — and in this case it is agreed by the demurrer that the defendant did believe — that such a fact had taken place, surely it cannot be criminal in him to announce it to his fellow-citizens. For saying this of the plaintiff, he is charged with a malicious slander, and this charge, as is also confessed, is made "with a view and intention to hurt and ruin his character and reputation, and with the wicked and malicious intent of destroying his usefulness as a selectman." — The question then is, whether an officer, maliciously libelled for a fact that had occurred in the course of his official duty, may not publish, in his vindication, what appeared to him a true account of the facts. He could do nothing else in this case. If the plaintiff did not believe the defendant's allegation as to his intent in publishing the words complained of, he might have put that intent in issue to the jury. The proceedings at elections have a strong similarity to proceedings in a court of justice; and it is not libellous to publish a true account of these latter. (2)

But the principal reliance of the defendant's counsel seemed to be on the insufficiency of the second count in the declaration. Of

(1) *Sir John Davies' Rep.* 172. — 1 *Lev.* 65, *Orton* vs. *Fuller*.
(2) 1 *Johns. Rep.* 286, *Hotchkiss* vs. *Lothrop*. — 1 *Esp. Rep.* 456, *Curry* vs. *Walter*

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themselves, it was observed, the words charged do not
[* 254] necessarily import a crime. It * would be no crime for an elector to put in a second ballot by mistake, or through mere forgetfulness. (3) The statute making the act criminal, requires that it be done "knowingly and designedly." (4) Again, the first voting may have been discovered to be irregular, and the box may have been emptied, and the electors called on to put in their votes a second time. There is no averment in this second count that there was a meeting for the choice of lieutenant governor, nor that the words were spoken with relation to such a meeting; and an *innuendo* has no power to add to, to enlarge, or change the sense of the words used. (5)

Prescott contended that in a declaration for a libel there must be enough to show that the words are libellous. If the words of themselves do not import a libel, averments of extrinsic matter are necessary to be introduced. The words charged in this second count are not of themselves necessarily libellous, for they will admit of an innocent interpretation, and there are no sufficient averments of extrinsic matter to make them criminal. Neither can this count be aided by reference to the first. This is never permitted in declarations for slander, though it is sometimes allowed in actions upon contract. Besides, the first count having been disproved *in toto* by the verdict, no aid can now be derived from it to the second.

Bigelow, in reply. The doctrine that slanderous words must necessarily import a crime, has been long exploded, nor was it ever extended to libels. (6) Any words throwing contumely on the party are actionable if reduced to writing. (7)

As to the point made, that reference cannot be made from the second to the first count, since that has been disproved, the case of *Tindall* vs. *Moore*, (8) is a sufficient answer, where one set of words were found to be not actionable, yet relation was had to them in the *innuendo* to another set of words, and the court supported the reference, and gave judgment for the plaintiff.

[* 255] * *By the Court.* Though the plea in bar may be bad in itself, as it seems to be agreed, it will yet be a sufficient answer to a bad declaration.

The question then remaining is on the insufficiency of the second count. The objection to it is, that the words charged do not of themselves amount to a libel, without recurring to the first count

(3) *Cowp.* 672, *Rex* vs. *Horne.* (4) *Stat.* 1800, *c.* 74, § 3.
(5) 1 *Saund.* 242, *Craft* vs. *Boite, note* 4.—2 *Chitty on Pleading*, 256, 259.—*Cro Car* 271, *Manning* vs. *Fitzherbert.*—2 *Lev.* 62.—6 *D. & E.* 691.—8 *East*, 431.
(6) 2 *Wils.* 403, *Villars* vs. *Monsley.*—5 *East*, 461.—3 *Salk.* 225.
(7) 1 *Bos. & Pul.* 331, *Bell* vs. *Stone.* (8) 2 *Wils.* 114.

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for circumstances necessary to prove their libellous nature. Whether such recurrence is admissible in this species of action or not, we do not think it necessary here to decide, because we are of opinion that the words in the second count of themselves sufficiently import scandal. The constitution and laws of the commonwealth, as they relate to our elections, are well known to the citizens. Few of them are ignorant that the law has inflicted a penalty on him who puts in two votes for the same officer. Fewer still, it is hoped, there are, who are not sensible that such an act is highly dishonorable to a citizen of a free republic, in which every one is entitled to equal rights; it is a base infringement of the rights of others, and the lenity of the law, in imposing so light a penalty on the commission of it, is very striking.

The words themselves, without the aid of the innuendoes, are plain and intelligible to the most ordinary minds. They could not be misunderstood by a citizen of *Massachusetts*. To give them an effect highly injurious to the plaintiff, it is even immaterial whether he was in fact present at the meeting, or whether such a meeting was held. The scandal takes effect on the public mind from their own import and force only. If the laws of our country did not animadvert on such an injury, they would be a disgrace to that country. But our laws deserve no such reproach. The plea in bar to the second count is bad and insufficient; and judgment must be entered on the verdict.

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* EBENEZER THOMPSON, Administrator of Eleazer Putnam, *versus* WILLIAM WOODBRIDGE.

Where usurious interest is not originally contracted for, though it be afterwards received, the security is not avoided, though the receiver may be subject to the penalty provided by the statute.

ASSUMPSIT on a promissory note made by the defendant, and dated January 14th, 1797, by which he promised to pay to the said *Eleazer*, then living, four hundred dollars on demand with interest.

At the trial on the general issue, the defence was, that the note declared on was a usurious contract. A verdict was taken by consent for the plaintiff, subject to the opinion of the court, on the following facts, agreed by the parties, *viz.*: —

On the 14th of January, 1796, the defendant made to the said

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Eleazer a promissory note for the payment of one thousand dollars within six months, *with interest after that period.* On the 14th of July, in the same year, the defendant paid the said *Eleazer* one hundred dollars in part, which was endorsed. On the 14th of January, 1797, the defendant paid the said *Eleazer* fifty-four dollars for the interest, and five hundred dollars more in cash, and at the same time the defendant gave the said *Eleazer* the note declared on for four hundred dollars; and the said *Eleazer* thereupon delivered to the defendant the first-mentioned note.

If, upon these facts, the Court should be of opinion that the note declared on was void as an usurious contract, it was agreed that the verdict should be set aside, and a general verdict be entered for the defendant; otherwise that judgment should be rendered on the verdict already found.

Ward, for the defendant, argued that this note was void, as being substituted for another, on which usury had been paid and received. It was, in fact, a security for the balance of the former note, including the usurious interest which had been paid thereon, and in effect may be considered as a note in part given for that very usurious interest. (1)

[* 257] * *Bigelow*, for the plaintiff, referred to the case of *Turner* vs. *Hulme*. (2)

By the Court. Where usurious interest is not originally contracted for, but is afterwards received, the party receiving it is subject to the penalty provided by the statute; but the note or other security is not avoided.

Judgment on the verdict.

(1) 3 *D. & E.* 537, *Tate* vs. *Wellings*. — 7 *D. & E.* 184, *Maddock* vs. *Hammet*
(2) 4 *Esp. Rep.* 11.

DAVID CUTLER *versus* NEHEMIAH HOW.

Where, by the terms of a contract, the party may, by payment at a day certain, avoid any stipulated penalty, such contract is not usurious.

THE action was *assumpsit* on a promissory note, made by the defendant, and bearing date the 17th day of April, 1809, by which he promised the plaintiff to pay and deliver to him nine hundred and twenty-eight bushels of oats by the 7th day of October then next.

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At the trial, which was had on the general issue, before *the Chief Justice*, at the sittings after the last October term in this county the plaintiff proved the making of the note. The defence was usury and fraud in obtaining it; and to maintain this defence, the defendant proved that the plaintiff, having, a few days before the date of the note, recovered judgment, and sued out execution against the defendant for the sum of 176 dollars 6 cents damages and costs, requested a deputy sheriff to take the execution, and to compel the defendant to pay the amount due in cash in four days, which the deputy refused to do. The plaintiff then told the deputy he might take the execution, if he would compel payment in ten days, which he also refused. The plaintiff then went to the defendant with the execution, to settle it with him, and proposed to discharge the execution, if the defendant would give him his note for the amount due upon it, payable in oats, at twenty cents the bushel, by the 7th of the then next October, reckoning as part of the amount what would be the sheriff's fees for levying the execution, estimated at 8 dollars 54 cents. And he * further stipula- [* 258]
ted, that if the defendant would give such note, he would discount upon the note five bushels of oats for each silver dollar paid thereon, if the defendant should pay one half in thirty days, and the other half in sixty days. On these terms the defendant made the note, which is the same that is declared on. On the 23d day of May next after the date of the note, the defendant paid one hundred silver dollars to the plaintiff, pursuant to the said agreement, which he endorsed on the note, in lieu of five hundred bushels of oats. — The defendant further proved that oats had not been known at *Hopkington*, where the parties live, to have been lower than 33 cents the bushel for many years past; and when the note declared on was made, they were not lower than 37 cents the bushel.

On these facts the defendant insisted that the contract was not merely unconscionable, but was at law usurious and void.

The Chief Justice, desirous to save the question, directed the jury, that they might consider the contract as unconscionable, and, in assessing the damages, might value the oats at 20 cents; and they found a verdict accordingly, including all the oats not endorsed or paid.

If, upon the foregoing facts, it should be the opinion of the Court that the note was in law usurious and void, the verdict was to be set aside, and a new trial granted.

And now *Bigelow*, for the defendant, moved that the verdict be set aside, contending, in the first place, that the note was usurious, and that the making it payable in specific articles was a mere color to avoid the statute

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The whole transaction carries on the face of it corruption and oppression; and although the intention of the parties to take it out of the statute is not for the Court to judge of, yet it ought to have been left to the jury, who are the competent and proper tribunal. (1)

[259] *Secondly. The including of the amount of what might have been due to a sheriff as fees for levying the execution, was unlawful and oppressive, and vitiated the whole note. (2)

Dana, for the plaintiff, argued that this was not a case of extortion, which could only be practised by an officer. Where a private person, availing himself of the necessities of another, takes from him a contract for more than is due, the contract is not thereby rendered void; although, if paid in full, the person thus oppressed may perhaps recover back the amount of what has been thus unjustly secured and paid. But, in the present case, the jury were instructed, if they found that oppression had been practised, or that the contract was an unconscionable one, they should deduct the extra amount, and find only what was justly and fairly due. (3)

This contract was not usurious, for it was in the defendant's power, by discharging it at a time certain, to avoid paying more than the original money, and that without any interest at all. (4) — Further, it is contended that this contract was within the proviso of the statute against usury, (5) by which it is prevented from having any operation upon "the letting of cattle, *or other usages of the like nature in practice among farmers.*" Those *other usages* have always been understood to relate to contracts for grain; respecting which it is a common practice to lend it on condition of repayment with large increase after the succeeding harvest. Thus, for a day's labor in reaping rye, a bushel of the grain reaped is the uniform price; yet if paid before the labor is performed, and out of the preceding year's crop, three pecks is always received as a compensation. In the present case, it will be noticed that a harvest was to intervene between the giving of the note and the day fixed for

(1) *Cro. Eliz.* 104, *Peterson's case.* — *Cro. Jac.* 440, *Bedo* vs. *Sanderson.* — *Comp.* 770, *Richards* vs. *Brown.* — *Ibid.* 112, *Floyer* vs. *Edwards.* — *Cro. Jac.* 507, *Roberts* vs. *Trenayne.* — 2 *Salk.* 390, *Mason* vs. *Abdy.*†

(2) *Cro Eliz.* 200, *Featherston* vs. *Hutchinson.* — *Ibid.* 847, *Coulston* vs. *Carr.* — 1 *Sid.* 38.

(3) 3 *Esp. Rep.* 209, *Barnett* vs. *Stone.* — 2 *D. & E.* 52, *Auriol & Al.* vs. *Thomas.*

(4) 1 *Hawk. P. C. c.* 82, § 3.

(5) *Stat.* 1783, *c.* 55.

† When this authority was cited, *the Chief Justice* observed, that the third volume of *Salkeld's* Reports was a book of no authority, being a posthumous collection, and consisting only of a compilation of such cases as *Salkeld* had himself considered as unworthy of publication

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payment, and that thus the price of oats might be essentially reduced. But after all it is apparent that the plaintiff's whole object was to insure a punctual payment of the sum actually due in cash; in which event there could have been no cause of complaint on either side.

* *The Court* held that the including the 8 dollars 54 [* **260**] cents in the note was oppressive, but from the facts, as reported, it did not appear to have been taken as usurious interest. By the terms of the contract, the defendant might, by making payment in thirty and sixty days, have avoided every thing but the discharge of what was honestly due from him, for which the note was given as security. It was not then void as a usurious contract. The verdict relieved the defendant from every thing oppressive in the contract, except the sum included as the officer's fees. That sum was directed to be deducted from the amount found by the verdict, and judgment to be entered on the verdict so amended.

AARON SANGER *versus* BROWN STIMPSON.

Where the promisor in a note of hand had left the commonwealth before the maturity of the note, and the holder left a demand at his dwelling-house on the day the note fell due, and on the same day gave notice to the endorser that the note was unpaid, and requested payment, the endorser was held liable, although not informed of the absence of the promisor.

ASSUMPSIT on a promissory note, dated the 12th day of July, 1808, made by one *William Prentiss*, by which he promised the defendant to pay him or his order one hundred and fifty dollars, *in foreign money*, in ninety days, for value received, and an endorsement by the defendant to the plaintiff.

In the declaration there were two counts. In one, the plaintiff averred a demand on *Prentiss*, and notice to the defendant, the endorser. In the second count, the plaintiff averred due diligence to demand payment of *Prentiss*, and notice to the endorser.

At the trial on the general issue, before the *Chief Justice*, at the sittings here, after the last October term, the plaintiff proved that, nine days before the debt became due, *Prentiss* left his home, and went to one of the Southern States, and did not return until the month of December, after the note was payable; that on the day it became due, he sent a written notice and request of payment to be

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delivered at *Prentiss's* dwelling-house; but which did
[* 261] not *come to *Prentiss's* knowledge; and on the same day he gave notice to the defendant, the endorser, that the note was not paid, and requested payment. — This notice to the endorser the defendant's counsel objected to as insufficient, because the endorser was not informed of *Prentiss's* absence, and that notice could not be given him. — *The chief justice* overruled the objection, and directed a verdict for the plaintiff, which was accordingly found. The defendant then moved for a new trial, on the ground of a misdirection of the judge, and the cause stood over for the consideration of that motion.

And now, at this term, *Bigelow*, of counsel for the defendant, urged the motion for a new trial, as well on the ground before suggested, as that the note was made payable in foreign money instead of cash, and so was not negotiable; and upon such a note an action cannot be maintained by an endorsee in this form.

But *the Court* held the declaration good, and that the objection to the notice to the defendant was not well taken; and they ordered judgment to be entered on the verdict.

Dana for the plaintiff.

RUFUS CLAFLIN *versus* JEREMIAH HAWES.

In *assumpsit* for not paying a sum of money in bank notes, the defendant pleaded a tender, and a *profert* of the notes into court; after issue joined on the tender, and found for the defendant, it appeared that the notes had not been brought into court: the plaintiff had judgment *non obstante veredicto*.

THIS action was *assumpsit* for not paying for a yoke of oxen sold by the plaintiff to the defendant. The contract was differently stated in five several counts. To the four first counts the defendant pleaded *non assumpsit*, on which issue was joined. In the fifth count, the plaintiff alleged a promise to pay seventy dollars in bank notes of any of the *New Hampshire* banks, except the *Coos* Bank. To this count the defendant pleaded a tender in bar of damages, with *tout temps prist*, and a *profert* of the bank notes into court for the plaintiff. To this plea the plaintiff replied *non obtulit*, on which issue was also joined.

[* 262] *Both the issues thus joined having been found for the defendant on trial before *the Chief Justice* at the sittings here, after the last October term, the plaintiff called for the bank

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notes, of which the defendant had made a *profert* in his plea; and it appeared that they had never been brought into Court, the defendant not bringing them in, nor delivering them to his counsel, that he might produce them.

The plaintiff thereupon moved the Court for relief in such way as the Court could grant, and the cause was continued for advisement.

At this term *Hoar*, of counsel for the plaintiff, stated the facts, and moved the Court for judgment *non obstante veredicto*, it being apparent from the whole record that the plaintiff was entitled to the money tendered.

Dana insisted that nothing but money could be brought into Court upon a plea of tender.

Per Curiam. This matter ought to have been adjusted at the bar. But as this has not been done, let judgment be entered for the plaintiff on the fifth count, to which the plea of tender was made. (*a*)

(*a*) [A *profert* in Court was unnecessary, and should have been regarded as surplusage. 2 *Kent Comm.* 508, *Lamb* vs. *Lathrop*, 13 *Wend.* 95. — *Bro. Touts temps prist. plac.* 31. — ED.]

THOMAS HARRIS AND OTHERS *versus* ELIPHALET NEWELL.

The covenantee in an action upon the covenant of warranty in a conveyance is entitled to nothing beyond the consideration paid and interest, until after eviction.

THIS was an action of covenant broken, in which it appeared, from the plaintiff's declaration, and the deed declared on, that the defendant, by his deed dated February 28th, 1792, for the consideration of three hundred dollars, conveyed a certain parcel of land described in the declaration to *Aaron Putnam* in fee, whose assignees the plaintiffs are; and that the defendant covenanted with the said *Putnam*, his heirs and assigns, that he, the defendant, was seised in fee of the premises; that they were free of all encumbrances; that he had good right to convey the same; and that he would warrant them against all persons. — The plaintiffs, in assigning the breaches, aver that the defendant * was [* 263] never seised in fee; that he had at no time any right to convey the premises; that they were encumbered by a right to be seised thereof in fee, which was then vested in the heirs of one

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Thomas Maudlin, then deceased; and that the said *Newell* has not warranted and defended the said premises to the plaintiffs; but that *Israel Jenkins* and *Abigail*, his wife, which said *Abigail* was one of the heirs of the said *Thomas Maudlin*, deceased, have since prosecuted a plea of land in her right against the plaintiffs, to recover against them one tenth part of the premises; against which suit the plaintiffs have no lawful right to contend, because the right to be seised in fee was in the heirs of the said *Thomas Maudlin*.

The defendant pleaded *non est factum*, on which issue was joined

At the trial of this issue, which was had at the sittings here after the last October term, before *the Chief Justice*, the execution of the deed being proved, the only question remaining was the rule, by which the damages ought to be assessed; the plaintiffs insisting upon the present value of the premises, after deducting the value of their improvements, which they could recover against the right owner by the statute of 1807, *c.* 74, § 3. — But the chief justice, intending to save this question, directed the jury to consider the covenants to be broken as soon as they were made, as there had been no ouster or eviction, and that the consideration money, with the interest, were the rule of damages; and the jury assessed the damages accordingly; the plaintiff reserving leave to move for a new trial without costs, or to discontinue, if the verdict should not be set aside.

And now, at this term, the cause having stood over for the consideration of the Court, *Bigelow*, of counsel for the plaintiff, suggested that it has never been settled that, upon the issue [* 264] of *non est factum*, the plaintiff shall not be permitted * to go into equitable considerations as to the amount of damages due him. In this case the plaintiffs proved, that there was a valid title paramount to that derived from the defendants, and that this title had already given rise to an action at law, by which the plaintiffs must inevitably lose the land. It would be a very great evil to persons thus situated, if they must lie by until an actual eviction from all the land took place, and in the mean time their warrantor might become insolvent, and so their legal remedy against him would be fruitless.

Gorham, for the defendant, was stopped by the Court.

The plaintiffs' counsel, perceiving that the Court were not inclined to set aside the verdict, had leave to discontinue, in order to bring their action after they should be evicted from the premises conveyed. (*a*)

(*a*) [Vide *Sumner*, Administrator, vs. *Williams & Al*, *ante*, 162. — ED.]

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JONAS PARKER *versus* ABIEL CHANDLER.

It is not a sufficient excuse for bail not surrendering their principal, that he is confined in the state's prison.

SCIRE FACIAS against the defendant, as bail of one *Jonathan Sprague*. It was agreed that the defendant was chargeable, unless the said *Sprague's* having been confined in the state's prison, on a sentence for passing counterfeit bank bills, was a sufficient excuse for the defendant's not surrendering him; and the Court observing that nothing but the act of God can excuse in the case of bail, the defendant suffered judgment to go against him by default.

Ward for the plaintiff.

H. Adams for the defendant.

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* RALPH SANGER *versus* THE INHABITANTS OF THE THIRD PARISH IN ROXBURY.

A person officiating as a reader in an Episcopal church, without ordination, is a public teacher within the constitution. Nor is it any objection to his recovering taxes paid by his hearers to another teacher, that he was engaged by contract for part of a year only, provided such contract was renewed and continued for a whole year.

THIS action, which was *assumpsit* for money had and received, was submitted to the decision of the Court on an agreed statement of facts, from which it appeared that the plaintiff was engaged in October, 1809, as reader to the incorporated Episcopal society in *Cambridge*, for the term of six months, and from that time to the date of his writ had been so engaged, but always by a contract of six months only, and had accordingly officiated in that character during the said term, never having been ordained or licensed to preach; — that *John Winthrop*, Esq., was an inhabitant of the said third parish in *Roxbury*, and was taxed in certain sums during the years 1808 and 1809, for the support of the Congregational minister of that parish; — that the said *Winthrop* was, during the years aforesaid, a member of the said Episcopal society, and having paid the taxes aforesaid, ordered them to be paid to the plaintiff as his public teacher, who afterwards regularly demanded the same.

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L. Richardson, for the defendants, objected to the plaintiff's recovery, because he did not officiate as reader to the Episcopal society at all during the year 1808, and only three months of the year 1809. Having never been ordained, it might admit of a question whether he could recover in character of a public teacher within the constitution, although he had officiated the whole time for which the taxes in the case were paid.

By the Court. We have no doubt that a person regularly engaged and officiating as a reader in an Episcopal society, is a public teacher of piety, religion, and morality, within the meaning and intent of the third article of our declaration of rights. Neither is it any objection to the plaintiff's recovery in this case that his contract was semi-annual only, if, under such contracts, he had officiated for the whole of either of the years, for which the taxes claimed by him were paid. But as this was not the case, he cannot have judgment. *Plaintiff nonsuit.*

D. W. Lincoln for the plaintiff.

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*THE MIDDLESEX TURNPIKE CORPORATION *versus* JOHN TUFTS.

An original writ prosecuted by a corporation, was endorsed thus, "The —— Corporation, by *A. B.*;" and it was held a sufficient endorsement; and the same remedy may be had against the endorser as if he had written his name only.

To this action the defendant pleaded in abatement of the plaintiff's writ that the same was thus endorsed, viz., "The Middlesex Turnpike Corporation, by *Royal Makepeace*;" whereas the said *Tufts* says, that although the said *Makepeace* is agent for the said corporation, yet the said writ ought to have been endorsed by some agent or attorney for said corporation with his Christian and surname, according to the statute in such case made and provided.

To this plea there was a general demurrer and joinder.

Bigelow, for the defendant, contended, that by this endorsement the agent had not made himself personally liable to the defendant for his costs; and therefore it was not a sufficient endorsement within the statute.

By the Court. The addition is nothing more than the law would imply, viz., that *Makepeace* was the agent for the corporation. The defendant will be entitled to the same remedy against him as if he had written his name only. *Respondeas ouster awarded*

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DAVID CUTLER *versus* SYLVANUS JOHNSON.

A owing *B* a sum of money, gives his promissory note, payable in six months, in a specific commodity at a much lower rate than its current value; the note not being paid at the time it fell due, the creditor put it in suit, and afterwards adjusted the suit by taking a new note for the balance of the former at the low rate of the commodity, and made the new note also payable at a given day, in a specific commodity at a lower rate than its current value; this last note was held to be usurious and void.

THE plaintiff declared in *assumpsit* on a promissory note made by the defendant on the 2d of June, 1809, for the delivery of 1920 bushels of oats in seven months from the date.

On the trial of the cause upon the general issue, before *the Chief Justice*, at the sittings here after the last October term, the plaintiff gave the note in evidence, which was agreed to have been made by the defendant. His defence was, that the note was void.

And he proved that *the plaintiff was endorsee of a note [* 267] which the defendant had given to one *Valentine*, on which were due 343 dollars; that the plaintiff called on the defendant for payment of that note, and proposed to give him six months for the payment, if the defendant would give the plaintiff a note for Indian corn of the value of that sum, reckoning the corn at seventy-five cents the bushel; corn then being worth one dollar the bushel; — that the defendant consented to this proposal, took up his note which had been endorsed to the plaintiff, and gave him a new note for Indian corn payable in six months; — that within the six months the defendant paid 100 dollars in part, which was endorsed on the note; — that at the expiration of the six months, the plaintiff put that note in suit against the defendant, pending which suit it was agreed by the parties, that the said note should be valued in cash, reckoning corn at six shillings the bushel, which was greater than the price of corn at that time; — that to this value should be added the interest thereof and the costs of the suit, from which amount should be deducted 100 dollars paid as aforesaid, and that for the balance the defendant should give the plaintiff a note for oats payable in seven months, estimating twenty cents as the value of a bushel of oats, and that for every twenty cents which the defendant should pay the plaintiff within the said seven months, a bushel of oats should be endorsed upon the note as paid; — that oats were then worth thirty-seven cents the bushel, and for many years had not been less but more in the place where the parties lived; — that the note declared on was accordingly given pursuant to

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the said agreement, the plaintiff declaring that he took it in that form without interest, to compel the defendant to pay the money within the seven months, as he much wanted the money.

The Chief Justice advised the jury, that they might, in assessing the damages, estimate the oats at twenty cents the bushel; and he directed them to find a verdict for the plaintiff, as he [* 268] should save the question of law, whether * the note was or was not void, and the jury found for the plaintiff accordingly. For this direction the defendant moved for a new trial, and the action was continued to this term for the consideration of that motion.

Bigelow, for the defendant, thought this a stronger case than that of the same plaintiff against *How*, decided this term; inasmuch as the defendant had no stipulation that he might discharge the note for corn at its real value; and for the balance of that note, reckoning the corn at one third more than its current value, and adding lawful interest, the note in the present case was given. This was extravagant usury, which tainted and made void the note, payment of which is now demanded.

And of this opinion was *the Court*. The verdict was accordingly set aside, and a new trial granted.

THE MIDDLESEX TURNPIKE CORPORATION *versus* THOMAS LOCKE.

Where the directors of a turnpike corporation, with the assent of the corporation, procured an act of the legislature, altering the course of the turnpike road, one who, before such alteration, had subscribed for a share, and had expressly promised to pay all assessments, was held not to be answerable in an action for the assessments.

THE declaration in this action was upon contract, and contained two counts. In the first count the plaintiffs aver that, in consideration they had permitted the defendant to become a member of the corporation, and a proprietor of one share of the stock thereof, and to be entitled to his proportion of all tolls and benefits which should arise from the said turnpike, he, by a memorandum in writing by him subscribed, purporting that the whole expense of making said turnpike was estimated at 40,000 dollars, and that it was proposed that there should be four hundred shares, promised and engaged to take one share, and to pay all assessments that should be

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made on the said share. The plaintiffs then aver that two several assessments had been made on each share, amounting in the whole to two hundred and forty dollars, of which the defendant had had notice, and refused to pay them. The second count is on a promissory note of hand made by the defendant to the plaintiffs for ten dollars, on which no question arose.

* The general issue being pleaded and joined, the [* 269] cause was tried before the *Chief Justice* at the sittings here after the last October term, and a verdict taken for the plaintiffs by consent of parties, subject to the opinion of the Court upon the following case reported by the judge: —

The said corporation was created by the statute of 1805, *c.* 12, which passed June 15th, 1805, and which is to be considered as a part of this case. Afterwards, on the 30th of July, in the same year, the defendant subscribed a memorandum of the following tenor: — "*The estimate of the whole expense of making* the Middlesex turnpike *is* 40,000 *dollars, and it is proposed that there be four hundred shares. We, the subscribers, hereby engage to take the number of shares set to our respective names, and pay all assessments which may be made thereon.*" And to his name he set one share. Afterwards there was duly assessed to each share, by two several assessments, the sum of two hundred and forty dollars, of which the defendant had due notice, and refused to pay them to the corporation. On behalf of the defendant, his counsel insisted that he was exonerated from his subscription on two grounds: that before either of the assessments was made, and after his said subscription, he had legally transferred his said share to one *Moses Harrington;* and that, after his said subscription, and also before the said assessments, the said turnpike road was differently located, pursuant to an act of the General Court, by the procurement of the directors, and with the assent of the said corporation. To make out this defence, he proved that on the 10th of May, 1806, he had agreed with the said *Harrington* to transfer his said share to him; that on that day he endorsed on the original certificate of his said share a transfer of the same under his hand and seal to the said *Harrington*, and carried the same to the clerk of the said corporation, to be by him recorded; that had the same been so recorded, the transfer would have been legal according to the by-laws of the said corporation; but the clerk refused to receive and record the same, because * the treasurer of said corporation, who, by the [* 270] same by-laws, was to sign the original certificates of the shares, had not certified to him a list of the original stockholders in the said corporation, although he had signed the defendant's said original certificate; that the defendant then delivered his said

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original certificate to the said *Harrington*, with the transfer aforesaid endorsed thereon, all which was done before either of the assessments aforesaid were made. On the second ground of defence set up by the defendant, it was proved, that by the statute of 1806, *c.* 7, the plaintiffs were authorized to alter the course of said turnpike road from Bisket bridge in *Tyngsborough* to the fork in *Bedford*; that this act passed on the application of the directors of the said corporation, with the assent of the said corporation at a meeting thereof duly holden, which last statute is also to be considered as a part of the case, and which passed before either of the said assessments was made, but after the defendant had signed his said subscription; that the turnpike road has been altered pursuant to the said last statute; that the defendant lives between the said fork and *Cambridge* rocks; and that the turnpike has not yet been made between the said fork and *Medford*.

The jury having assessed the damages severally on each count, it was agreed that if the Court should be of opinion that the verdict was rightly taken for the plaintiffs on both the counts, the plaintiffs should have judgment upon it; otherwise the verdict should be so amended, that the plaintiffs should have judgment only on the second count.

The cause stood continued to this term for argument; and now, *Stearns*, for the defendant, contended, that this contract was void as a *nudum pactum*, and without consideration, involving in it neither a detriment to the plaintiffs nor a benefit to the defendant. At any rate, if the defendant was bound on his part, there was nothing by which the plaintiffs were bound to him. The engagement was all on one side and therefore not binding. (1)

[* 271] * Before the assessments were made, the defendant had virtually ceased to be a proprietor, if he ever had been one.

He did all that was incumbent upon him, and all that was in his power to do, to transfer his share of the stock to *Harrington*. The wrongful conduct of an officer of the plaintiffs prevented what was further necessary to be done according to their by-laws; and of this the plaintiffs ought not to be permitted to avail themselves. (2)

But the point, on which the defendant most relies, is, that he never consented to become a proprietor in the turnpike, as it was in fact located and made. He was induced to subscribe originally, on account of the particular convenience to him of the turnpike as originally directed. He would perceive no such convenience in the other route.

(1) *Cooke* vs. *Oxley*, 3 *D.* & *E.* 653.
(2) *Huddersfield Canal Company* vs. *Buckley*, 7 *D.* & *E.* 36.

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He would never have subscribed to aid the latter; and the plaintiffs have no right to transfer his subscription for the promotion of one road to that of another, without his personal assent.

Dana for the plaintiffs.

By the Court. We decided, in the case of *The Andover and Medford Turnpike Corporation* vs. *Gould*, (3) that where the members of a turnpike corporation agree expressly to pay the assessments that may be made by the corporation, an action lies for the recovery of such assessments. — To the objection that the defendant had done all in his power to assign his share, we do not attach much weight. Such a transfer might be made to a pauper, with the intent merely to rid the proprietor of his obligation to the corporation, and to deprive the latter of all remedy but from the sale of the shares, which is well known to be a fruitless remedy. If, however, it was done *bonâ fide*, and with no design to deprive the corporation of their legal remedies, — and there is no ground to think otherwise of the transaction in the case before us, — it would require consideration, before we should hold the original proprietor answerable for the assessments; especially when he had been prevented from completing the transfer in the mode prescribed in the by-laws of the corporation, by their own officer. — But it is not necessary to *give an opinion on this objection, as we [* 272] are satisfied that on the last point, made by the counsel for the defendant, he must prevail. The plaintiffs rely on an express contract, and they are bound to prove it as they allege it Here the proof is of an engagement to pay assessments for making a turnpike in a certain specified direction; and of the making a turnpike in a different direction. The defendant may truly say, *Non hæc in fœdera veni.* He was not bound by the application of the directors to the legislature for the alteration of the course of the road, nor by the consent of the corporation thereto. Much fraud might be put in practice under a contrary decision. We are not, however, to be understood as deciding that the general legal remedy by sale of the shares does not remain to the corporation in this case; although we are of opinion that the defendant is not holden by the express promise to pay the assessments, on which the present action is brought. According to the agreement, under which the cause was reserved at the trial for the opinion of the court, the verdict must be so amended, that the plaintiffs may take judgment upon the second count only, which is upon a promissory note not disputed.

(3) 6 *Mass. Rep.* 40.

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JOHN OYSTEAD *versus* ZACCHEUS SHED AND OTHERS.

Where the plaintiff had endorsed the original writ, and had afterwards absconded and left the state, a new endorser was ordered to be furnished.

IN this case, the plaintiff had endorsed the original writ, not having at that time any fixed place of residence within the commonwealth; and since the commencement of the action he had absconded and left the state.

The defendants moved that a new endorser should now be furnished, who should be sufficient to respond to the defendants their costs, in case they should have judgment for them.

By the Court. Let the allegations be verified by affidavit, and then a new endorser must be procured. The case is within the equity of the statute, (1) which, when it provides that the writ shall be endorsed by the plaintiff, must intend such an endorser as can be found.

(1) *Stat.* 1784, *c.* 28, § 11.

[*273]

*TILLY BUTTRICK AND WIFE, Executors, *versus* WILLIAM ALLEN.

Assumpsit lies on a judgment of a foreign court; but such judgment is only *primâ facie* evidence; and the defendant has all the benefits he would have in an action for the original cause. — The affidavit of one who assisted the clerk of the foreign court in comparing the copy, &c., and saw him attest it, is a sufficient verification of the judgment. The defendant, where the former judgment was rendered on his default, may avoid the judgment by showing that he was not within the jurisdiction of the foreign court.

THIS action was *assumpsit*, brought by the plaintiffs, as executors of the last will of *Elizabeth Dix*, upon a judgment recovered by their testatrix against the defendant in the inferior Court of Common Pleas for the county of *Shelburne*, in the province of *Nova Scotia*.

A trial was had at the last April term in this county, before *Sedgwick*, J., upon the general issue of *non assumpsit*, and a verdict taken for the plaintiffs, subject to the opinion of the Court, on the following questions, *viz.*:—

1. Whether the evidence in the case, and which was annexed to 230 .

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a certified copy of the judgment alleged to have been recovered in the province of *Nova Scotia*, is sufficient to prove the same.

2. Whether such a judgment is sufficient evidence to support an action upon the implied promise, which is set forth in the count upon which the verdict is taken.

[The evidence referred to in the first question reserved was the affidavit of one *John Davis*, who swore that he applied to the reputed clerk of the Common Pleas for the county of *Shelburne* (being the same person who attests the copy of the judgment) for a copy of the record of the judgment; that he assisted the said clerk in comparing the copy with the record, and in affixing the seal of the court to the copy, and saw the same clerk attest the copy by putting his name to it.]

Dana, of counsel for the defendant, contended that to the verification of the copy of the record the oath of the clerk himself ought to have been produced. — He also took an exception that the judgment was rendered upon the non-appearance of the defendant, and that there was nothing in the proceedings to show that he ever had notice of the suit, except that, in the introduction to the declaration, it is recited that he "*was attached* to answer," &c.; and to this point he cited the case of *Buchanan* vs. *Rucker*. (1)

Hoar, for the plaintiffs.

* *By the Court.* The verification of the record is [* 274] sufficient for the purpose for which it is produced.

There is no doubt that *assumpsit* lies upon a foreign judgment; but the judgment is no more than *primâ facie* evidence, and the defendant has all the benefits he would be entitled to in an action upon he original cause. It was competent to the defendant to prove in the trial of the present action that he was not within the jurisdiction of the foreign court, and its effect would be avoided. In the case cited from *East's* reports, the defendant *Rucker* is called of the city of *London*, and it does not appear that he was ever in the island of *Tobago*, and the notice plainly shows that he was not then to be found there; but in the record before us, the defendant is named as "late of *Waltham*, in the commonwealth of *Massachusetts*, but *now* of *Shelburne*," &c.

Judgment on the verdict.

(1) 9 *East*, 192.

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Elizabeth Fox *versus* Moses Fletcher.

A devise of land to husband and wife creates a joint tenancy, notwithstanding the statute of 1785, c. 62.

This was a real action, and came before the Court upon an agreed case to the following purport. — *Stephen Russell*, father of the demandant, being seised of the demanded premises in fee simple, on the 25th day of May, 1800, by his will duly executed, *inter alia*, devised as follows, *viz.*: "I give unto my son-in-law *Eliphalet Fox*, and my daughter *Elizabeth*, his wife, three fourths of all my real estate, and three fourths of the thirds given to my wife, after her decease." — The said *Stephen Russell* died, without altering or revoking his said will, which was duly proved on the 16th day of September, 1800. — The tenant claims under a conveyance in fee simple from the said *Eliphalet Fox*, who has since deceased. The demandant, who is the devisee named in the above devise, after the death of her said husband, entered upon the demanded premises, before the commencement of this action.

Stearns for the demandant.

Bigelow for the tenant.

[* 275] * *The Court* observed that this case must be decided by that of *Shaw & Al.* vs. *Hearsey & Al.*, (1) and that the demandant was entitled to judgment upon the facts disclosed.

Bigelow agreed that the case should be discharged; that the tenant should plead the general issue, and upon the coming in of the jury suffer a verdict to pass against him.

(1) 5 *Mass. Rep.* 521.

Abraham Bigelow, Clerk, &c., *versus* Ebenezer Bridge.

A bond given by a county treasurer, for the faithful discharge of the duties of his office, is intended to protect the public during the year for which he was elected.

Debt on bond. The parties agreed to submit the case to the determination of the Court upon the following facts, *viz.*: "The said

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Ebenezer Bridge, being elected treasurer of the county of *Middlesex* in May, 1790, executed the bond declared on, which has the following condition underwritten, *viz.*: "The condition of this obligation is such, that whereas the above bounden *Ebenezer Bridge* is chosen treasurer of the said county of *Middlesex*, and hath taken upon him that trust, — Now, therefore, if the said *Ebenezer Bridge* shall faithfully discharge the duties of the office of treasurer of said county, and account for all sums of money which he shall receive for the use of the said county, then this obligation shall be void; otherwise to remain in full force." — The said *Bridge* was annually elected treasurer of said county from the year 1790 to the year 1806, inclusive, and annually accounted as treasurer with auditors appointed by the Courts of Sessions and Courts of Common Pleas for said county, every year during his continuance in said office, except the last. But no other bond was ever given by him as treasurer of said county. There is due to the county from the said *Bridge*, as the balance of his accounts for the year 1806, the sum of eighty dollars. — If, upon these facts, the Court shall be of opinion that the said *Bridge* is liable in this action for the above-mentioned balance, he is to be defaulted, and judgment rendered against him for that sum with interest; otherwise the plaintiff is to become non suit.

* *By the Court.* The bond in this case appears to [* 276] have been given to the plaintiff, as clerk of the peace for this county, pursuant to the provisions of the statute of 1785, *c.* 76, § 1. But the choice of county treasurer being by that statute annual, it is apparent that the bond required by it was intended for the protection of the public, so long only as the person chosen should continue in office in virtue of such election. A new bond should regularly have been taken for each several year, for which the defendant was elected. If this bond were valid against the defendant to cover the *deficit* of his last official year, it would be equally valid against his sureties; but they could never contemplate their contract as binding them thus indefinitely. And indeed it is to be presumed that the plaintiff did not consider them as held to answer the present demand, as he has not joined them with their principal in this action. But the principal in a bond is no further bound than his sureties. Let the plaintiff be called.

Plaintiff nonsuit.

Stearns for the plaintiff.
Hastings for the defendant.

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THE INHABITANTS OF WALPOLE, Plaintiffs in Error, *versus* THE INHABITANTS OF WEST CAMBRIDGE.

In a complaint, and also in an adjudication for the removal of a pauper, it is required to state the cause of the likelihood of his becoming chargeable.

It is not sufficient for the Common Pleas, upon such an adjudication, to file or record the evidence on which their judgment is founded; they must make a statement of the facts.

THE writ of error in this case was brought to reverse a judgment of the Court of Common Pleas for this county, adjudging the settlement of *Nathaniel Nason*, a pauper, to be in the town of *Walpole*. and ordering his removal thither from the town of *West Cambridge*, to which town the court say he was likely to become chargeable.

The process was originated by a complaint of the overseers of the poor of *West Cambridge* to a justice of the peace for the
[* 277] county of *Middlesex*, in which they allege * generally that the said *Nason*, then resident in said town, was become poor, and was likely to become chargeable to that town, and that his lawful settlement was in *Walpole;* whereupon they pray for process, &c. — The justice having adjudged that the pauper was not likely to become chargeable to *West Cambridge*, and awarded costs to *Walpole*, the former town appealed to the Common Pleas, where it was adjudged "that the said *Nathaniel Nason* is likely to become chargeable to the town of *West Cambridge;* that the lawful settlement of the said *N. N.* is in the said town of *Walpole*, and that he be removed thither; and that the original complainants recover their costs."

Stearns, for the plaintiffs in error, took several exceptions to the proceedings, the principal of which were, 1. That it was not alleged in the original complaint, nor in the final adjudication, either that *Nason* was actually chargeable to the town of *West Cambridge*, or in what manner or by what means he was likely to become chargeable. The statute of 1793, *c.* 59, "providing for the relief and support, employment and removal of the poor," &c., in the tenth section, which gives this process, provides for the removal only of "persons actually chargeable, or who, through age or infirmity, idleness or dissoluteness, are likely to become chargeable, to the places wherein they are found, but in which they have no lawful settlement." The complaint, as well as the adjudication, ought to set forth, either that the person in question is actually chargeable at the time of the complaint, or is likely to become so from some one or more of the causes specified in the statute. This is a summary

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proceeding before a justice of the peace, in which more strictness is required than in proceedings according to the course of the common law; and though the law be not in its form a penal statute, yet its provisions are very severe, often imposing grievous suffering where no crime is imputable; and for this reason also the construction should be strict, and the proceedings closely conformed to its prescriptions.

*2. The statute, § 11,† requires that the Court of [*278] Common Pleas, in all their adjudications, shall state the facts upon which their judgments are founded, to the end that error therein, if any, may be corrected by writ of error in this Court. — This is wholly omitted in the adjudication before the Court. After the joining of the issue by the parties, the record proceeds — "Whereupon, after due examination and hearing, and upon due consideration of the premises had, the court here do adjudge," &c. It is true that to the record sent up there are attached several depositions, which, it may be presumed, were used at the hearing; but *non constat* that these formed the whole evidence produced, or that the court gave credit to them. However this may be, the statute is express in requiring the court to state the facts proved.

Bigelow, for the defendants in error, insisted that the complaint and the adjudication were in the form prescribed by the statute. It may frequently be difficult to state precisely the causes of the likelihood or probability of one's becoming chargeable to a town. Idleness may have led to dissoluteness, which may have induced infirmity, and to all these may be added old age. Neither could the legislature, by enumerating these particular causes, intend to exclude all others, which must be the construction, if one or more of these must necessarily be specified; for a man may be in health, and neither idle, dissolute, nor old, yet, by the sickness of his family, by a fire or flood destroying his property, and in many other conceivable ways, he may be likely to become chargeable. The particular causes enumerated must then be inserted merely as examples, and not with intent to enumerate all the causes for which a removal may be authorized. — Further, the forms of the complaint, and of the adjudication, as well before a justice of *the [*279] peace as in the Courts of Common Pleas, are prescribed at full length in the statute; and they have been precisely pursued in the proceedings now under the consideration of the Court. How, then, are they to be considered erroneous?

† In the edition of the public statutes, printed by order of the General Court, in the year 1807, vol. ii. page 667, a gross mistake has occurred. After the 16th line from the top, ending with the words, *shall state*, is omitted one whole line, viz., *other facts, when it shall appear, by suggestion or otherwise*, ——

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All the useful purposes of that provision of the statute, which requires the facts to be stated, are better fulfilled by recording the evidence at large, when it consists wholly of written documents, as was the case here. In this way the Court here, having the original evidence before them, are furnished with better means of arriving at the merits of the suit, than they could be by an abridged or condensed statement, drawn up by the Court, who, from having received the evidence as sufficient to ground their judgment upon, might insensibly give a color to the facts different from what they would wear to the eye of one examining them free from such bias.

By the Court. As the statute expressly requires the Common Pleas to state the facts upon which they found their judgment, and it is very certain that they have not done it in the case before us, the judgment must be reversed. On the other point made by the counsel for the plaintiff in error, we are of opinion that a pauper is not removable, unless actually chargeable, or likely to become so, from one or other of the causes mentioned in the statute. The form of the complaint furnished in the statute is general, and must be adapted, by him who has occasion to use it, to the circumstances of the case he would exhibit.

Judgment reversed.

COMMONWEALTH *versus* STEPHEN CUTTER.

A warning in writing, in good form, left at the house of a soldier by a stranger, under the direction of a non-commissioned officer, is sufficient.

One who has served seven years in a volunteer corps, is, *ipso facto*, entitled to his discharge; and, after demanding it, is no longer liable to a fine for neglecting to attend a muster of the corps.

THIS was a *certiorari*, brought to quash the proceedings before a justice of the peace for this county, had upon the complaint of the clerk of a volunteer corps of militia called
[* 280] * the *Medford Independent Light Infantry*, against the respondent, for not appearing at a muster of the said company, having been duly warned. The justice convicted him, and sentenced him to pay a fine.

Austin, for the respondent, took two exceptions to the proceedings, *viz.*, 1. That it did not appear that he was legally warned. — 2. That it appeared that he was entitled to his discharge from the said company before the time of the muster, and so not liable to a fine.

As to the first point, it appeared that the captain of the company

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duly issued his orders to one of the sergeants, commanding him to notify the company at the time and place alleged in the complaint; that the sergeant made out a written notification to the respondent in legal form, and caused it to be left at his house in due season by one *Davis*, a minor, and servant of the sergeant, and not one of the company; that the respondent received the said notification four days before the time fixed for the muster; and that it had always been the practice to notify the members in that manner.

By the 18th section of the statute 1809, *c.* 108, being the act for regulating, &c., the militia, it is made the duty of the non-commissioned officer or private of a company, upon receiving orders therefor from the commanding officer, to give notice of the time and place appointed for the parade of such company to each and every man, either by delivering to him in person, or by leaving at his usual place of abode, a written or printed order four days previous to the time appointed. And the testimony of such non-commissioned officer or private is made conclusive to prove that due notice was given to the party prosecuted, unless such testimony be invalidated by other evidence.

Austin insisted that this duty must be done by the officer himself, and could not be done by deputy or proxy, any more than a writ could be served by the proxy of a person authorized by law to serve it. And the provision that the officer's oath should be conclusive evidence of the fact, is * wholly repugnant to [* 281] the idea of his performing the service by proxy; as in such case he could have but the declaration of another, as the foundation of his own positive testimony. It is material, that in this case the proxy employed was not only a minor, but not even a member of the company.

The facts, as stated in the justice's record, which went to prove that the respondent was entitled to his discharge, were, that the respondent had removed from *Medford* to *Charlestown* previous to the said muster; that he had belonged to said company more than seven years; and that he had demanded his discharge from the commanding officer, before he removed to *Charlestown*.

By the statute of 1799, *c.* 73, § 3, it is enacted that every person enlisting into any volunteer corps shall be holden to do duty therein for the term of seven years, unless sooner discharged, &c.

Austin argued, from this provision, that a soldier, having served in a volunteer corps for seven years, was, *ipso facto*, entitled to his discharge upon his demanding it, and that, after such demand, he could not legally be considered as a member of such corps, nor obliged to do military duty therein.

Bartlet, in support of the record, argued that what an officer

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who, in the case of warning the company, acted merely as the servant of the commander, might do by himself, he might do by the intervention of another. The testimony of the officer, though conclusive, is not made by the statute the only evidence; and the oath of a disinterested stranger might be considered at least as good evidence as that of an officer of the company interested in multiplying the fines. But the objection must have little weight in the present case, since the fact is found that the respondent actually received the notification in due and legal season.

As to the respondent's right to a discharge under the provision of the statute cited, *Bartlet* contended that the [* 282] *intention of that provision was not to limit the enlistment of privates in corps of this kind to seven years absolutely and in all cases, but merely to prevent the operation of other grounds of exemption in the case; as that they should be held seven years, although before that term had expired they should arrive at the age of forty-five years, or been appointed to some office, which by law is made an exemption from all duty in the militia.

By the Court. The service of the notification we think sufficient to have compelled the soldier's appearance, or the exaction of a fine for his neglect, had he been liable to serve in this corps. But we are of opinion that he was not so liable. After seven years' service he was regularly entitled to his discharge. Any other construction of the clause of the statute cited to this point would render it nugatory.

Proceedings quashed.

ABNER PEIRCE *versus* WILLIAM WHITTEMORE, Administrator.

In an action against the administrator of an insolvent estate, who had been guilty of laches in the Probate Court, by a creditor whose claim had been allowed by the commissioners, judgment was rendered for the amount of the dividend awarded the plaintiff by the Judge of Probate.

ASSUMPSIT on two promissory notes made by the defendant's intestate, *Thomas Whittemore*, to the plaintiff.

The case was referred to the opinion of the Court on the following facts: — That the notes were made as declared on, and for a valuable consideration; that the defendant duly returned an in-

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ventory of the intestate's estate, and having represented the estate insolvent, commissioners were appointed, before whom the plaintiff proved his claim; that on the 13th of November, 1807, the commissioners made their report to the judge of probate, the whole amount of claims allowed by them being 1472 dollars 33 cents; that on the 15th of January, 1808, the defendant settled his first account of administration, on which a balance was found due to him of 127 dollars 28 cents; that afterwards he obtained license to sell all the real estate *of his intestate, [* 283] and accordingly sold the same, but did not settle a final account of his administration within the time required by law, and he refused to settle with or pay over any proportion to the plaintiff; that the plaintiff sued this action on the third of March, 1810; that on the 12th of April, 1810, the judge of probate allowed the defendant five months further to settle his administration account, within which time he did settle his final account, after which a dividend of the estate was decreed, at the rate of 25 cents upon the dollar, the plaintiff's share being 58 dollars 12 cents; that the defendant thereupon would have paid the plaintiff his said proportion, if he would have received it; but this was not until this action had been brought up from the Common Pleas by appeal, and entered in this Court.

Austin for the plaintiff.

Dana for the defendant.

The Court, taking into consideration the equitable circumstances of the case, ordered judgment to be entered for the dividend awarded by the judge of probate to the plaintiff upon the report of the commissioners, with interest thereon from the date of the plaintiff's writ. *The Chief Justice* referred to the case of *Wilde* vs. *Griffin*, (1) which was an action by an overseer of the poor upon a promissory note given by one charged as the putative father of a bastard child. The child died in a month after its birth; and the defendant had before paid more than the expenses the parish had incurred. Lord *Ellenborough*, before whom the cause was tried, instructed the jury, that if they thought the money paid covered the whole expenses the parish had been put to, there was no consideration for the note, and they ought to find for the defendant. And they found accordingly. (*a*)

(1) 5 *Esp. Rep.* 142. See also *Coke* vs. *Gower*, 6 *East*, 110, *there cited.*

(*a*) [It seems to be settled, that a partial failure of consideration will be no defence to a note or bill, unless the *quantum* be liquidated or certain. *Chitty on Bills*, 8th *Lond. ed.* p. 88. — ED]

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*BENJAMIN WHITMAN *versus* JOHN E. TYLER AND OTHERS.

In the extent of an execution on land, the three appraisers must certify, or if two only certify, a sufficient reason must be given why the third did not; if the officer appoints two of the appraisers, it must appear, from his return, that the debtor refused; — such extent must be recorded within three months to avoid a *bonâ fide* mesne conveyance of the land.

Entry sur disseisin, wherein the said *Whitman* demands a certain messuage and land in *Cambridge*, counting on his own seisin within thirty years, and on a disseisin by the tenants.

Joseph Enos, one of the tenants, suffered judgment to go against him by default.

From an agreed statement of facts, upon which the action, as between the demandant and the other tenants, was referred to the determination of the Court, it appeared that the demandant claimed under a conveyance of the demanded premises made to him by one *M. R. Bartlet*, which was agreed to have been made *bonâ fide*, and upon an adequate and valuable consideration.

The tenants, who were parties to the statement, claimed under three sundry executions, which had been levied upon several parcels of the demanded premises; which executions issued upon judgments rendered in favor of creditors of the said *Bartlet*, in suits against him wherein the said parcels had been severally attached prior to *Bartlet's* deed to the demandant.

The only questions in the cause respected the validity of the extent of the said executions respectively. The creditors in the same were *Asa Ellis*, *Nathaniel Bridge*, and *Jonathan Brooks*.

The objections to the extent of *Ellis's* execution were two. — 1. That but two of three appraisers, who had been appointed and sworn, subscribed the appraisement of the premises extended upon; and no reason was given why the third did not subscribe, nor did it appear whether he was present at the appraisement. 2. That the execution, with the doings thereon, had not been recorded in the registry of deeds for the county within three months, as required by statute 1783, *c.* 57, § 2.

To the extent of *Brooks's* execution an objection was made, but not insisted on, that the description of the premises extended on was too loose and uncertain.

[* 285] *It was objected to the extent of *Bridge's* execution, that the officer had selected two of the appraisers, *viz.*, one *ex officio*, and the other in behalf of the debtor, without certifying that the debtor had refused, or assigning any other reason.

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The Court pronounced their opinion that the extent upon *Brooks's* execution was sufficient to enable him to hold the land set off to him thereon; and that the extent on *Bridge's* execution, and on *Ellis's* execution, were insufficient and void. — The demandant accordingly, having shown a good and sufficient title to the demanded premises, except that part on which *Brooks's* execution was levied and extended, had judgment for his possession of the same, and for his costs.

Whitman pro se.

Bigelow and *Fay* for the tenants.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF ESSEX, NOVEMBER TERM, 1811, AT SALEM.

PRESENT:

HON. THEODORE SEDGWICK,
HON. SAMUEL SEWALL,
HON. ISAAC PARKER,
} JUSTICES.

THE CASE OF JOHN TUCKER.

The Court will not set aside a grand juror, because he has been the prosecutor of a person accused of a capital crime, whose case may probably be brought before the grand jury.

HE was returned as a grand juror from the town of *Gloucester*, and when he was called to be sworn, *Story*, as *amicus curiæ*, suggested that one —— —— had been accused of the crime of murder, and that it would come under the consideration of the grand jury at this term, whether an indictment should or should not be found against him for that crime; that Mr. *Tucker* was a neighbor of the accused, living in the same town, had originated the complaint against him, and had most probably formed a strong opinion of his guilt; and that it was therefore unsuitable that he should be sworn of the grand jury.

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Being inquired of by the Court, if he had known or read of an instance of an objection of this kind being received to a grand juror, *Story* said he had read, in a printed account of the trial of *Aaron Burr*, at *Richmond*, in *Virginia*, of challenges to grand jurors being made in behalf of the prisoner, for a similar cause, and allowed by the court.

* *The Court* here recollected the instance referred [* 287] to, observing that it was a solitary one, as far as their knowledge of the books extended. And they said, if objections of this nature were to be received, the course of public justice would be greatly impeded. Those who live in the vicinity of persons accused are probably better knowing than others to the general character of the parties, and of the witnesses; and on this account are perhaps the more proper members of the grand jury, who will derive useful information from their knowledge. If, however, any individual juror should be sensible of such a bias upon his mind, that he could not give an impartial opinion, in any case under the discussion of the jury, such juror would feel it his duty, as it would be his right, to forbear giving an opinion, or perhaps to withdraw himself from the chamber, while the discussion continued. — Mr. *Tucker* was sworn. (*a*)

(*a*) [In *Dickenson's Guide to the Quarter Sessions*, it is stated, that "In practice it is not uncommon, and may be discreet and proper, when the names are called over, for the Court to direct the names of all those to be omitted who reside in a particular district in which matter of prosecution has arisen, calculated to excite feelings in the inhabitants inconsistent with the calm administration of impartial justice" — *Dick.*, by *Serj. Talfourd*, 4th ed. p. 140 — ED.]

EBENEZER PUTNAM *versus* DANIEL DUTCH.

Where a bill of sale was made by one part owner of a vessel to another, she being then in another port than that where the bill of sale was made, and the vendee claimed possession of her on her arrival a few days after at the port where the bill of sale was made, and where he resided, the sale was held valid and good against a creditor of the vendor, who caused her to be attached immediately after the bill of sale was executed.

THIS was a writ of *replevin*, by which the plaintiff replevied the sloop *Lydia* and her appurtenances. — The defendant pleaded property in one *Edward Allen*, and avowed the taking, &c., by virtue of a writ of attachment against the said *Allen*, at the suit of *Thomas Webb* and *John Beadle*, served by the defendant as a

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deputy sheriff. — The pleadings closed in an issue to the country upon the property of the plaintiff; and a verdict was taken for the plaintiff, subject to the opinion of the Court on the report of *Sewall*, J., before whom the cause was tried at the sittings here after the last November term.

It was proved or admitted at the trial, that the vessel in question was the joint property of the plaintiff and the said *Allen*, having been enrolled in their names, December 11th, 1809, the plaintiff owning three eighths, and *Allen* five eighths thereof, until the evening of the 16th of April, 1810. At the hour of eleven, [* 288] or a little earlier, that evening, * the *said Allen* executed and delivered to the plaintiff a bill of sale of five eighths of the sloop and appurtenances, to hold to him in mortgage, and upon condition for his security and indemnification against certain notes and endorsements, in which the plaintiff had become liable for the said *Allen*; and with authority to sell and dispose of his interest in the said sloop for the purpose of paying the said notes, accounting for any surplus, &c. This transfer, as far as the bill of sale could effect it, was made at *Allen's* house in *Salem*, and the vessel then lay at *Manchester*, where she was employed in receiving a freight, under the care of one *Burbeck*, who testified that he had been master of her for eight years on shares, the vessel having been occupied as a coaster. For the last five years he had kept and settled his accounts with *Allen*, who acted as ships husband, the plaintiff not having been known to him as a part owner, otherwise than by the enrolment. — At one minute after twelve o'clock in the night time between the said 16th and 17th days of said April, according to the return made by the defendant upon the said writ of attachment, he attached and seised the said vessel at *Manchester*, and continued in possession of her until replevied by the plaintiff. — The vessel, after remaining a few days at *Manchester*, came with her freight, laden on board there, to *Salem*; and immediately upon her arrival, the plaintiff went on board, and notified his claim to the sole property of the vessel, and demanded the possession of her. This being refused, he caused her to be replevied.

It was admitted at the trial, on the part of the defendant, that the plaintiff had been obliged to pay the said notes and endorsements, in which he had become liable for the said *Allen*, and had not been indemnified respecting them; and on the part of the plaintiff, that the demand of the said *Webb* and *Beadle*, in their writ of attachment, was just and recoverable against the said *Allen*. — And it was agreed between the parties, that the dispute was to be considered as between *bonâ fide* creditors of *Allen*; and that

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he absconded, *and became notoriously insolvent in the [* 289] morning of the said 17th of April.

The jury were directed to find for the plaintiff, if they believed that the bill of sale was executed by *Allen*, in point of time, before the said attachment; the question of the legal effect of the bill of sale, and the right of the plaintiff to recover, under the circumstances of this case, being saved by the judge at the request of the defendant. The action stood continued to this term upon the judge's report; and now,

Story, of counsel for the defendant, contended that the bill of sale to the plaintiff was wholly inoperative for want of a delivery, and consequently the property not passing out of *Allen*, the attachment on the part of *bonâ fide* creditors was valid and sufficient to hold the vessel against the plaintiff's bill of sale. Delivery is as necessary between part owners as upon a sale of the whole, where, as was the case here, the vendor has the actual possession; and this rule extends to mortgages. (1) In this case *Allen* had not only the sole possession, but also a sole qualified property, as he was the bailiff of *Putnam's* three eighth parts. Yet possession was not attempted to be taken under the bill of sale until several days, although the vessel was in a neighboring port, and so known to be by the plaintiff.

But we contend further that replevin does not lie in this case; because there was no tortious taking from the possession of the plaintiff. (*a*)

The *Court* interrupted *Story*, observing that this point was not open to him upon the pleadings in the case; and that, for a recovery in the action on his part, it would be necessary for him to show the property of the five eighth parts in question to have been in *Allen* at the time the defendant made the attachment.

Pickering for the plaintiff. At the common law the property in personal chattels passed on the execution of a bill of sale; and the bankrupt laws have no operation here; *but [* 290] the plaintiff in this case did every act that could reasonably be required of him towards perfecting his title under *Allen's* conveyance. It does not appear that he knew, or even had the means of knowing, that the vessel was at *Manchester*. From the nature of her employment in the coasting trade she must naturally be constantly changing her place. Upon her arrival at the port of *Salem*, the place of residence of all the parties, and this within a few days, he demanded the possession, to which he was

(1) See *Abbott on Shipping*, *B.* 1, *pt.* 1, § 5.
(*a*) [See the note to *Badger vs. Phinney*, 15 *Mass. Rep.* 359. — ED.]

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entitled; and being resisted, he immediately sued out his writ of replevin.

But we contend that, as a joint owner with *Allen*, he was under no obligation to take possession. The possession of *Allen* was his possession. *Burbeck* was equally the agent of both, and his actual possession must have been as the servant of both the owners. The enrolment was necessarily in the possession of the master in behalf of one owner as much as of the other; and upon the execution and delivery of the bill of sale, the possession, as well as the property, was virtually transferred from *Allen* to the plaintiff.

SEDGWICK, J., delivered the opinion of the Court.

In this case it is very clear that the bill of sale from *Allen* to the plaintiff, being upon sufficient consideration, was valid as between the parties to the instrument. The only question is, whether it be so against *bonâ fide* creditors of *Allen*, such as *Webb* and *Beadle*, under a process issuing in whose favor the defendant claims to hold, are admitted to be.

The conveyance of the sloop *Lydia* from *Allen* to the plaintiff was not absolute, but conditional, by way of mortgage, with a power to sell, to secure him against certain liabilities which he had incurred for the debts of *Allen*, this latter not being actually indebted to him at the time. Whether if, under these circumstances, *Allen* had been suffered to continue possession of the vessel jointly with
[* 291] the * plaintiff, such possession would have been inconsistent with the deed, or otherwise fraudulent against creditors, it is not necessary now to determine.

If a ship be at sea, a transfer by bill of sale, without delivery, is good as against all persons; and the reason is, that as, between the parties, the contract is binding in all cases; and the subsequent possession of the vendor avoids it as to third persons, only because it is an indication of fraud; which reason cannot apply in a case where delivery is impossible. We see no reason why the exception should not extend to protect contracts relating to ships which are at home, but in a port distant from the place where the contract is made. In such case the vendee should take possession within a reasonable time. (*b*) Whether that was done in this instance, the facts stated do not enable us to decide. We are of opinion that the distance between *Salem* and *Manchester* is immaterial; and we know not how long the vessel remained at the latter place, except that it was only a few days.

But there is one circumstance, upon which we are satisfied that

(*b*) [*Ingraham* vs. *Wheeler*, 6 *Con.* 283—284. Sed vide *Lanfear* vs. *Sumner*, 17 *Mass. Rep.* 110. — ED.]

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the plaintiff is entitled to recover. The vessel was seised by the defendant in an hour after the execution of the bill of sale by *Allen*. She was then the property of the plaintiff, his title being liable to be divested by his *subsequent* laches. The possession of the defendant was, therefore, in its inception wrongful; and we are of opinion that the plaintiff, in suffering that possession to continue for a few days, was not guilty of such negligence as thereby to have forfeited his claim. Indeed, it must be a strong case, in which wrong by sufferance shall be matured to right. It will be observed, that immediately on the vessel's arrival at her home in *Salem*, the plaintiff went on board her, and attempted to take possession. (*c*)

Judgment on the verdict.

(*c*) [A sale of a share or interest in a chattel, less than the whole, is good, without actual delivery. *Addis* vs. *Baker*, 1 *Anst.* 222. — *Haskell* vs. *Greely*, 3 *Greenl.* 425. — *M'Calla* vs. *Bullock*, 2 *Bibb*, 228. — ED.]

[* 292]

* ESSEX TURNPIKE CORPORATION *versus* BENAJAH COLLINS.

No action lies for a turnpike corporation, for the assessments, against one who had subscribed a promise to take shares and to pay the assessments thereon, after a part of the turnpike was completed, no act of the corporation either previously authorizing, or afterwards ratifying, his subscription.

THE action was *assumpsit*. The declaration, as finally settled by consent of parties at the trial, contained a count for money laid out and expended, and another money count, and also a special count, in which is set forth, — that the plaintiffs, before the last of March, 1807, had, at great expense, laid out and made that part of a turnpike road, beginning at the line of *New Hampshire* and coming to the *Haverhill* post road near the south meeting house in *Andover*, &c., pursuant to their act of incorporation; and that afterwards divers other persons than the original members, and among them the said *Collins*, severally associated with a view to become members themselves, and to procure others to become members of the said corporation, to the end that the whole of the said turnpike road described in said act of incorporation should be completed by laying out and making the residue thereof, pursuant to said act, *viz.*, the *Salem* road, to proceed from *Andover* bridge, in as straight a line as should be found practicable, to the store of Capt. *Nathan Felton*, in *Danvers*; and that the property of the said corporation

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had not been limited to a certain number of shares, but subscription papers were open and publicly offered to all persons inclined, &c., and the amount or proportion of all the expense of the whole of the said road, to which a single share might be liable, was then uncertain, depending upon the number of shares, including those of the original members which might thereafter be subscribed for and taken, &c. Of all which the said *Collins*, on the day and year last mentioned, had notice; and that in consideration of the premises, and that at his special instance and request, he was permitted to take and subscribe for four shares of the property of the said corporation, and to become a member thereof, &c., he, the said *Collins*, then and there faithfully undertook and promised the said corporation that he would take and become interested in the said four shares of the capital or joint stock of the said corporation,
[*293] *and would upon request *pay* such proportion of all the expense of the whole of said turnpike road as the said four shares, by him taken and subscribed for as aforesaid, should bear to the whole number of shares which had been and should thereafter be taken and subscribed for, of the capital or joint stock of the said corporation; — provided the branch of the said turnpike road, that is, the *Salem* road aforesaid, should be continued from *Andover* Bridge to *Felton's* corner, in as direct a line as the nature of the ground would admit, agreeably to the said act of incorporation; with averments that the said *Collins* had been afterwards offered certificates of his said shares; that the whole number of shares amount to five hundred and forty-two, including the shares of the original members; that the said *Salem* road had been laid out and made, &c.; that all the expenses of the whole of said road amounted to sixty-nine thousand four hundred and seventy-eight dollars and twelve cents; and that, relying upon the promise of the said *Collins*, the plaintiffs had actually expended a great sum of money, *viz.*, five hundred and twelve dollars and twenty-two cents, as the proportion of all the expenses of the said road appertaining to the said four shares; of which the said *Collins* had had notice; yet, though often requested, he had refused to pay, &c.

At a trial before *Sewall*, J., upon the general issue, which was had at the sittings here after the last November term, the plaintiffs submitted to a nonsuit, which was entered, subject to the opinion of the Court upon the facts proved and reported as follows by the judge who sat at the trial.

The supposed promise and undertaking of the defendant is expressed in a certain subscription paper, proved to have been signed by him and others in the months of March and April, 1807, in these words: — "We, the undernamed subscribers, severally agree

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to take and *pay* our proportion of the number of shares in the *Essex* turnpike affixed to our respective names, provided the branch of said * turnpike road be continued from *Andover* [* 294] Bridge to *Felton's* Corner, in as direct a line as the nature of the ground will admit, agreeably to the act of incorporation."

The writing was without date; but a Mr. *Foster*, sworn for the plaintiffs, testified that he carried the subscription paper to the defendant early in the spring of 1807, when he subscribed his name for two shares, and again in the month of April of the same year, when he subscribed anew, or altered his first subscription, and became a subscriber for four shares; and that this took place before the meeting of the corporation holden at *Salem*, 21st of April, 1807. — The same witness, being cross-examined for the defendant, testified that the subscription was recommended to the defendant by the witness, as a matter of public utility, and an undertaking for the purpose of making and opening the *Essex* branch of the said turnpike; and the witness also informed the defendant that the other part of the said turnpike was already made and completed, and that if he came in, he would be on the footing of an original subscriber, and that, in the opinion and estimate of the witness, the whole expense of the said turnpike would be about 52,000 dollars, and would not amount to 100 dollars per share; but he made no statement, as the witness recollected, of the amount of assessments to which four shares in the said corporation were then liable. — *Samuel Farrar*, Esq., treasurer of the said corporation, testified that it had not been usual to charge any person with assessments until his acceptance of a certificate for his share or shares subscribed; that subscribers, by the second subscription paper aforesaid, had been required to pay the two first assessments of ten dollars each upon every share subscribed immediately upon their receiving certificates; that on the 22d of April, 1807, he made application to the defendant for the amount due upon the four shares subscribed by him for the two first assessments, and he declined paying until he had his certificate; and in three or four weeks afterwards, upon a second application by the witness, when he carried with him * a certificate of four shares for the defendant, and [* 295] so informed him, he still declined paying, and then said he was willing to take shares to the amount of 400 dollars, which he had understood to be the extent of his engagement, but was not willing to take four shares with the risk of paying all the assessments.

The act of incorporation and (subject to an exception taken for the defendant to the want of evidence by the certificate of the

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magistrate before whom the clerk of the said proprietors had been sworn and qualified for that office) the records of the said corporation, commencing with their first meeting, May 14th, 1805, and containing the by-laws then agreed upon; also the books of their said treasurer admitted in evidence for the plaintiffs, were to be considered as in the judge's report, to be referred to, if there should be occasion.

From the said records (if admissible) it would appear that the proprietors, parties to the original subscription for the said turnpike road, (also in evidence and in the case,) at their said first meeting, came to a choice of directors, and by a by-law or vote gave them authority to assess upon the several proprietors the expense of laying out and completing the said turnpike road, and to notify said assessments, and to sell the shares of delinquent proprietors neglecting to pay &c.; and that ten assessments, the first on the 8th of July, 1805, the last on the 18th of October, 1806, and the others at several times in the interval between those days, amounting in the whole to the sum of 150 dollars per share, were made by the directors for the time being of the said corporation, at meetings regularly holden by them.

It was also proved that the regular notice by advertisements according to the proprietors' vote had been given of the said assessments. From the same records it further appeared that at the meeting of the said corporation holden at *Salem* on the 21st of April, 1807, it was agreed and voted to lay out and com-
[*296] plete the said *Salem* branch of the said * turnpike, according to the act of incorporation, and two additional directors were then chosen; and by parole evidence it was proved that several persons, parties to the last subscription paper, but not the defendant, were present with the other proprietors at that meeting.

From the books of the treasurer of the said corporation it appeared that the members of the said corporation, proprietors by the said original subscription paper, were charged with the said assessments at a certain number of dollars upon each and every share undertaken by them respectively; and that such of the subscribers in the second subscription paper as had accepted certificates of their shares were charged in the like manner with the said assessments previous to their subscribing, or previous to any vote of the corporation to lay out and make the *Salem* branch of the said turnpike.

There was no evidence, from the said records or otherwise, of any authority to the directors, or to any committee, or other person employed in behalf of the corporation, to engage or agree with subscribers upon any other footing or terms of payment than those voted, agreed, and established by the original subscribers and mem

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bers of the corporation for themselves, *viz.*, the authority given the directors to sell the shares of delinquent proprietors.

The action was continued upon the plaintiffs' motion to set aside the nonsuit, and was argued at this term by *Prescott* and *Putnam* for the plaintiffs, and *Dane* and *Story* for the defendant.

For the plaintiffs, it was contended, that this was a lawful, fair, and binding contract on the part of the defendant. He, with others in *Salem* and its vicinity, were desirous that the branch of the turnpike leading towards *Salem* should be completed. They knew that for this end a new subscription was necessary, and in consideration of their subscribing for this part of the undertaking, which was not expected to afford an adequate remuneration, they were let in to a proportionate share of the other branch, which was * expected to be more productive. This was in itself a [* 297] sufficient consideration. It may be added that the benefit contemplated to accrue individually to the new subscribers from this new direction of the turnpike formed another valuable consideration.

It is well known that in this country enterprises of this description have not been productive of profit to those who have engaged in them; nor is this generally a primary object of consideration with the subscribers. They are well aware that the community is benefited by them, and they agree to take a share of the burden. Here, then, was an express promise, upon a valuable consideration, not only to become a proprietor, but to pay all lawful assessments. And this Court has decided, in the case of *The Worcester Turnpike* vs. *Willard*, that such a promise is binding, and will support an action for the assessments. (1) The same point was recognized in *Gilmore* vs. *Pope*. (2)

If it be objected, that the obligation was not mutual or reciprocal, it may be answered, that whether *Foster* was authorized in the case or not, the corporation actually completed the *Salem* branch of the turnpike in consequence of the subscription of the defendant and others, and their treasurer tendered him the certificates of the shares he had subscribed for, thus completely adopting and ratifying *Foster's* acts.

For the defendant, it was said that there was no evidence of any contract on the part of the corporation, and without this there was no mutuality of consideration, which is necessary to every contract. *Foster* had no power to bind the corporation, and as to the after completion of the turnpike, it was no more than they were bound to by their charter. The defendant had no means of compelling them

(1) 5 *Mass. Rep.* 80. (2) 5 *Mass. Rep.* 491.

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to complete the turnpike, or even to admit him as a member of the corporation. (3) Further, from the very terms of the agreement in this case, the engagement was not to the corporation, but of the subscribers to each other. The case of *the Worcester* [* 298] *Turnpike* vs. *Willard* was very different * from this. There the shares were taken, and the promise was express *to pay all assessments*. So was the case also in *Gilmore* vs. *Pope*. In both those cases also the consideration was that the turnpike should be carried in a particular direction, by which it may be presumed the subscribers contemplated a personal benefit to themselves; and in both cases the number of shares was limited and fixed. Here the number was unlimited, and, by thus opening new shares as subscribers offered, a fraud was committed on the original members.

Sedgwick, J. delivered the opinion of the Court.

By the act incorporating the plaintiffs, the purpose intended was to make a turnpike in one direction communicating with the town of *Boston*, and in another with the town of *Salem*. After that part of the road which communicated with *Boston* had been completed, a Mr. *Foster* — whether a member of the corporation or not does not appear, nor is it material in the view which I have taken of the subject — procured from the defendant and others a subscription of their names to the paper mentioned in the judge's report; by which they agreed to take and *pay* their proportion of the number of shares affixed to their respective names. This was in the month of April, 1807. Afterwards, on the 27th of the same month, the corporation, at a legal meeting, voted to lay out and complete the *Salem* branch of the turnpike. And it appeared by parole evidence, that several of the persons who signed the subscription paper, which has been mentioned, were present at that meeting; but the defendant was not with them. And the treasurer of the corporation afterwards made out, and offered to the defendant certificates of ownership of the four shares for which he had subscribed. — The question is, whether the defendant is liable, in this action, upon that subscription.

It is certain, that to every valid contract there must be parties Aggregate corporations cannot contract without vote, because there is no other way, in which they can express [* 299] * their assent. Such corporations may contract by their agents; but such agents must have authority given them for that purpose. In this case, no such authority was given to Mr *Foster*. And admitting that the corporation might be bound by

(3) 3 *D. & E.* 653, *Cook* vs. *Oxley*.

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subsequent assent, there is no evidence that any such assent was given. It does not even appear that this subscription paper was ever communicated to the corporation. It is true, that soon after the subscription was made by the defendant, the corporation voted to lay out and make the *Salem* branch of the turnpike; but this they were previously obliged to do by the act of incorporation. And it is impossible to consider the mere attendance of some of the subscribers at a meeting of the corporation evidence of a contract on its part; that fact being no evidence of an act of the corporation. And as little avail can the making out certificates of ownership to the defendant by the treasurer of the corporation, have; because there is no evidence that he had any authority for that purpose.

Reverse this case, and suppose an action brought by the defendant against the corporation for withholding certificates of owner ship; there could be no pretence for supporting it on the evidence which was offered against him at the trial. There is no act by which the corporation was bound to admit him as a member; and if there was not, there was no sufficient consideration to bind him. The nonsuit therefore cannot be taken off.

Costs for the defendant

JOHN DAVIS *versus* LEONARD COBURN.

An apprentice is not assignable.

THIS action, which was case upon contract, came before the Court on the following facts agreed by the parties.

"The parties agree that on the 20th of July, 1809, the plaintiff was the master of an apprentice, *Stephen Davis*, who was, by indenture duly made and executed by the father of the said apprentice, bound to serve the plaintiff * for the term of [* 300] three years thereafter, when he would arrive at the age of twenty-one years; and that the said *Coburn* made the following agreement, *viz.*: —

"*Lynn*, July 20th, 1809. Articles of agreement made this 20th of July, 1809, between *John Davis*, of *Bradford*, in the county of *Hillsborough*, and state of *New Hampshire*, on the one part, and *Leonard Coburn*, of *Lynn*, in the county of *Essex*, and state of *Massachusetts*, gentleman, on the other part, agreeth to sell the remainder part of the time of *Stephen Davis*, an indented apprentice, to me,

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the said *Coburn*, for the term of three years from the date hereof; and I, the said *John*, do, by these presents, agree to relinquish all claim to the said *Stephen Davis* during said term of apprenticeship, at the said *Coburn's* own risk of sickness or absconding; and the said *Coburn*, on his part, agreeth to pay unto the said *John Davis* one hundred and fifty dollars, in form and manner following: first, fifty dollars on demand; secondly, fifty dollars in one year from the date hereof and fifty more at the expiration of said apprenticeship; the said *Coburn*, on his part, further agreeth to clothe said apprentice with good and decent every-day clothing, and to school said apprentice one month in every year, and to equip said apprentice for training, and to teach or instruct, or cause him to be instructed in his art or trade of carpenter and joiner's work, according to his best skill and knowledge."

On the 16th of October, 1809, said *Coburn*, in pursuance of said agreement, paid to the plaintiff fifty dollars; and the said *Stephen*, on the 7th day of July, 1810, absconded from the service of the said *Coburn*.

"And the parties further agree, that the indenture before mentioned shall be considered as part of the case, that the Court may take notice of any statute of the state of *New Hampshire* on the subject of apprenticeship; and finally that if the Court, upon the foregoing facts, shall be of opinion that the plaintiff might maintain [* 301] any action for * the recovery of damages, the defendant shall be defaulted, and thereupon damages shall be assessed for the plaintiff; but if the Court shall be of opinion that no action can be maintained therefor, the plaintiff shall become nonsuit."

Story for the plaintiff. This was a good and valid agreement between the parties, made upon sufficient consideration. The defendant was to have the services of the apprentice, and in lieu of them the plaintiff was to receive a sum of money. But admitting that no benefit was to accrue to the defendant, it is a sufficient consideration that the plaintiff was to suffer a detriment, *viz.*, the actual loss of the earnings and services of his apprentice; and a slight detriment, labor, or injury thrown on the party, is sufficient to support an *assumpsit*. (1) The contract in this case was executed, and a benefit resulted to the defendant in the services of the minor; and the contract cannot be apportioned.

Although the case of *Hall & Al.* vs. *Gardner & Al.* (2) seems

(1) *Com. Dig. tit. Action upon the Case upon Assumpsit, G.* 11.
(2) 1 *Mass. Rep* 172.

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to have decided that the binding of an apprentice is a mere personal trust, and cannot be transferred or assigned, yet the binding in this case having been in *New Hampshire*, its effect and the rights and powers of parties under it must be governed by the laws of that state; and we do not admit that by those laws the assignment of an apprentice is either illegal or void. And even in this commonwealth such an assignment, although it may not operate to convey an interest, is not illegal, or a contravention of any statute provision. Supposing, therefore, this instrument to be an assignment, although it cannot have its operation as such, yet it is by no means without effect; it operates as an agreement for the service of the apprentice, which may be legally made by his master

In *Rex* vs. *St. George Hanover Square* (3) it was held that a master might hire out his apprentice by parole contract, and thereby the apprentice might gain a settlement, as being a regular and lawful servant. So in *Rex* vs. *Stoke Fleming*, (4) where an apprentice was assigned, the * court held that though [* 302] the assignment could not strictly be made, yet the service, being by the assent of the master, would be good. The same principle was held in *Rex* vs. *Clapham*, (5) in *Rex* vs. *Tavistock*, (6) and in *Rex* vs. *Christowe*. (7) In *Castor* vs. *Aicles*, (8) it is distinctly held that although an apprentice be not assignable, yet the assignment amounts to a consent that the minor shall serve the assignee, which is good in law; "so that the assignment is good by way of covenant, though it be not an assignment to pass an interest."

But, strictly speaking, this is not an assignment, but a mere agreement for the service of the minor. He is to learn the same trade, with as good advantages, and manifestly upon terms as much for his benefit as those made with the master; and the minor appears for a year to have consented to it. The hiring was lawful; and unless it is established that at all events an apprentice is to live exclusively with his master, and cannot be in the service of another by his consent, the present contract must be supported; and cases may easily be put, in which such a principle would work manifest injustice.

Pickering, for the defendant, read a statute of the state of *New Hampshire*, passed December 28th, 1805, the first section of which requires the consent of the minor to every indenture. This was wanting in the original indenture in the case at bar, and thence it was argued that the original binding was a mere nullity. By the

(3) *Burr. Settlement Cases*, 12. (4) *Ibid.* 248. (5) *Ibid.* 266.
(6) *Ibid.* 578. — *W. Black. Rep.* 635, *S. C.*
(7) 11 *East. Rep.* 95. (8) 1 *Salk* 68 — 1 *L. Raym.* 683, *S. C.*

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last section of the same statute, it is provided that no apprentice shall be held by his indentures after the death of his master; whence it may be inferred that it is considered as against sound policy in *New Hampshire* to permit the assignment of an apprentice, and that it is therefore void.

In *Baxter* vs. *Burfield* (9) it was held that an executrix was not entitled to the services of an apprentice bound to her testator; and the reasons given by the court apply with equal force to the case of an assignment. "The binding was to the *man*, to
[* 303] learn *his* art, and serve *him*, without * any mention of executors. And as the words are confined, so is the nature of the contract; for it is fiduciary, and the lad is bound from a personal knowledge of the integrity and ability of the master." That an apprentice was not assignable by his master at common law appears from the language of the statute of 32 *Geo.* 3, mentioned in a note to the case of *Baxter* vs. *Burfield*, in the later editions of *Strange*. And in the case of *Hall & Al.* vs. *Gardner & Al.*, of which the plaintiff's counsel is aware, the court were unanimous and clear that the binding was to the master personally; it was a mere personal trust, and could not be transferred; the assignment was therefore a nullity.

The plaintiff might at any time have reclaimed his apprentice, and this parole agreement could not have been pleaded in bar of the original indenture; so that in fact there was no legal consideration for the agreement; and in point of equity there is certainly no claim, since the plaintiff received in the first instalment a full consideration for the time that the minor remained in the defendant's service.

The cases cited for the plaintiff are all cases of settlement, and relate wholly to that subject; but it is one thing for an apprentice to gain a settlement by service in a parish, and quite another thing for him to be so bound as that the master or his assigns can lawfully claim his services.

Story, in reply. The minor's consent is not required by the statute, except where the binding is by the mother or guardian. Here the minor considered himself bound, and acceded to the transfer. So also did his master, and the defendant likewise. Suppose a master unable from sickness to teach his apprentice the trade he professes; will it be said that he is not still bound to cause him to be taught? So if the master be permanently disabled. — The plaintiff could never have retaken the minor; he must be bound by his contract. And he is equitably entitled to recover

(9) *Strange*, 1266.

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*in this action, for he agreed to take the risk of de- [* 304]
sertion upon himself. The plaintiff relinquished his claim to the services of the apprentice, and was actually deprived of them, in consideration of the defendant's contract to pay him a sum of money, which he now claims, and to which he holds himself entitled in equity as well as in law.

The action stood continued *nisi* for advisement, and at the following March term in *Suffolk*, the opinion of the Court was delivered as follows by

SEDGWICK, J. On the 30th of March, 1808, *James Davis*, by a deed of indenture with *John Davis*, bound his son *Stephen Davis* to *John*, from that time until he should arrive at the age of twenty one years.

On the 20th of July, 1809, *John Davis*, the master, who is the plaintiff in this action, entered into articles of agreement, *but not sealed*, with the defendant, whereby the plaintiff undertook to sell to the defendant the remaining time of the apprentice, being then three years.

In the indenture of apprenticeship, the plaintiff, among other covenants, undertook "to use the utmost of his endeavors to teach, or cause to be taught and instructed, the said apprentice in the art and mystery of a *house joiner*, if the said apprentice be capable of learning with reasonable pains being taken." In the articles of agreement entered into between the plaintiff and the defendant, the latter, among other things, undertook "to teach or instruct or to cause the apprentice to be instructed in *his* art or trade of *carpenter and joiner's work*." The plaintiff relinquished all claim to the apprentice during the term of apprenticeship, *at Coburn's risk of sickness or absconding*. In consideration of this, *Coburn* undertook to pay to the plaintiff one hundred and fifty dollars by three equal instalments; the first on demand, the second in one year, and the last at the expiration of the apprenticeship.

*The first payment was made soon after; and the [* 305]
apprentice absconded from *Coburn* on the 7th of July, 1810, that is, in thirteen days less than a year from the time of entering into the agreement; so that the defendant has actually paid, for the service performed by the apprentice, beyond the rate at which the value of his services was computed by the parties.

The general question is, whether the defendant is bound by his agreement to pay the remaining hundred dollars; — and as he assumed the risk of the absconding of the apprentice, that question depends upon this, *viz.*, whether there was a good and lawful consideration for the undertaking of the defendant.

The original contract, by which *Stephen Davis* was bound by his

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father an apprentice to the plaintiff, was entered into in the state of *New Hampshire*; and I assume it as true, that, by the laws of that state, a father has a right to bind his son an apprentice, in the manner it was done in this case. If that is not true, there can be no pretence for maintaining this action; for it would be a gross violation of natural justice, moral obligation, and personal liberty, for a man, having no lawful authority, to sell a human being; and such a contract certainly could not be enforced in a court of justice. Supposing, then, that, by the indenture between the father and the plaintiff, this latter acquired a property in the services of the apprentice; was it a property which he could assign to a stranger?

That a father, during the minority of a child, should have a power to dispose of a requisite portion of his authority, for the purposes of education and instruction, is frequently important and necessary to the welfare of the child; but in doing this, a due regard to the interest of his child will render him cautious to what hands he confides the trust; and for this purpose a wise and prudent parent will be as anxious about the moral qualities of the man, to whom he delegates his authority, as to his competency in other respects. But all his attention in this regard would be useless, if the master might immediately transfer or assign his authority to another; not merely within the limits of the state to which he belongs, but, as was the case here, into another independent jurisdiction. And if he could transfer him into *Massachusetts*, I see not why he might not have sent him to *Georgia*, or even to *China*. That a master should have such a legal authority would be monstrous; and if he have it not, to exercise it is a violation of natural right, and immoral, and consequently can be no good consideration for the support of an action. But the decision of the question does not *now* depend upon reason alone. It has long been determined by authority.

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There is a solitary case, (10) in which it has been determined that an action lay against executors on a covenant of apprenticeship entered into by the testator; but this was overruled and denied to be law in the case of *Baxter* vs. *Burfield*, cited at the bar. In the case of *Bedell* vs. *Constable*, (11) in considering the statute of 12 *Car.* 2, *c.* 24, authorizing parents to appoint guardians for their children, it was decided that such a special guardian cannot assign the custody of the ward, by deed or will, to any other person; and the reason given is, because it is a personal trust, which can never be transferred, whether the appointment be by the act of law or of an individual. And it is there truly said, that "a more near or tender

(10) *Lev.* 177. (11) *Vaugh.* 177.

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trust cannot be, than the custody and education of a man's child." — In the case of *Coventry* and *Woodhall*, (12) the action was brought on a deed, in which the defendant had covenanted, under a penalty, to instruct his apprentice in the art of surgery; and the breach assigned was, that he had sent him out of the realm to *Bantam*, in the *East Indies*. The defendant pleaded, that he had sent him out with expert surgeons, the better to learn the art. To this plea there was a demurrer, on which the plaintiff had judgment, *because* the trust was personal. In the case of *The King* vs. *The Inhabitants of Stockland*, (13) it is admitted that an apprentice ship is not assignable nor transmissible. And in the
* case of *Hall & Al.* vs. *Gardner & Al.*, also cited at [* **307**] the bar, this Court determined that an apprenticeship cannot be assigned, the master having a mere personal trust. Many more authorities might be mentioned; and it may be added that the principle is affirmed by many approved commentators, and, I believe, denied by none.

If an apprenticeship is not assignable, it follows that the transfer by the plaintiff to the defendant, in breach of the personal trust confided to him by the father, was a wrong inflicted on the apprentice, and did not confer on the defendant any authority nor any right to the services of the apprentice. It was, in fact, a mere act of unauthorized power; and admitting that in this the parties were *in pari delicto*, the maxim applies, *Melior est conditio defendentis*.

But the case of *Castor* vs. *Aicles*, which is reported by *Salkeld* and Lord *Raymond*, and some other cases, were cited in the argument, to prove that an apprentice bound to a master in one parish, and by him assigned to a man living in another, if he resides the requisite period of time with the latter, acquires a settlement in *his* parish, as having served an apprenticeship there. There are many cases to this effect. (14) From them it was intended that it should be inferred, that such an assignment is not merely inoperative and void. I confess myself unable, after much consideration, to extract any consistent principle from those cases. There are several of them, which contain, to my mind, much loose and unintelligible declamation. It is not, however, necessary to enter into a minute discussion of them, as it is a sufficient answer to their intended application, to observe that they are irrelevant to any question presented by the case under consideration; their united authority, as to the point adjudged, going no further than to establish this

(12) *Hob.* 134. (13) *Doug.* 69.

(14) *Strange*, 10, *Parishes of Holy Trinity and Shoreditch.* — *Ibid.* 1001, *Parishes of St. George's Square and St. James's, Westminster.* — *Ibid.* 1115, *The King* vs. *The Inhabitants of East Bridgeford.* — 1 *W. Black.* 635. — *Doug.* 69.

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position, — that a service *de facto*, in consequence of an assignment of an apprenticeship, will bring the pauper, who has so served, within the true intent and meaning of the acts of parliament, so as to give him a settlement where such service is performed. (*a*)

Plaintiff nonsuit.

(*a*) [See *Dickenson's Guide to Quarter Sessions*, by Serj. *Talfourd*, pp. 696—788, and cases there cited. — ED.]

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*CHARLES CLEVELAND AND OTHERS *versus* THE UNION INSURANCE COMPANY.

Where a loss by capture of a neutral ship arises from the negligence of the master, in leaving the ship's register, &c., on shore, the underwriters are not liable

THE plaintiffs declare in an action of the case, first upon a policy of insurance upon the brig *Liberty*, her cargo and outfits, of which a total loss by capture in the voyage insured is averred. The second count is for money laid out and expended.

A trial was had at the sittings here after the last November term, before *Sewall*, J., and a verdict taken for the plaintiffs, in which the damages were assessed for the value of the vessel as insured, for a quantity of provisions and salt on board belonging to the owners, and for expenses incurred in claiming the vessel, when libelled in consequence of the capture. The verdict was taken subject to the opinion of the Court upon the facts to be reported by the judge who sat at the trial, and was to be amended in the amount of damages assessed, or to be set aside, and a verdict entered for the defendants, or a new trial granted, as the opinion of the Court should be.

The policy, dated October 30th, 1804, together with sundry depositions and other documents, including a certificate from the registry of the Court of Vice Admiralty at *Columbo*, in the island of *Ceylon*, of the condemnation of the vessel, and the master's protest, were read in evidence, and were to be referred to as parts of the case. — The material facts, which were agreed to be proved by this evidence, the judge reports as follows: —

By the policy in question, 12,000 dollars were insured by the defendants upon the brig *Liberty*, *Jonathan Lambert*, *Jun.*, master, and her appurtenances, valued at 6000 dollars, and her cargo and outfits at 6000 dollars, "at and from *Salem* to any port or ports,

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place or places, backwards and forwards, round the globe one or more times, during her stay and trade at all such places, until her return to her port of discharge in the *United States;*" — against all the * usual perils, including capture and [* 309] detention of princes, &c., excepting only, by a note at the bottom of the policy, "any loss that might take place for illicit or contraband trade with or by any power whatever;" — for a premium at and after the rate of three quarters of one per cent. per month, with liberty to withdraw the policy at any time, warranting nine per cent. due on signing thereof.

In the month of November, 1804, the vessel, with suitable outfits for a sealing and oil voyage, sailed from *Salem*, destined to the *South Sea*, and in the latter part of May, or beginning of June, arrived off the *Prince Edward* Islands. After a few days employed there in hunting for seals, in which they had very little success, the failure being caused, as they believed, by the lateness of the season, they sailed for the *Crozette* Islands, but not finding them, after a month employed in looking for them, the vessel returned to the *Prince Edward* Islands.

There several attempts were made to get water, of which they were in want. In one of these attempts the captain and several men having been landed, a gale of wind came on, and the vessel was driven off, and did not regain the island until after fourteen days; when the captain and men were found and taken on board, with a small quantity of water. And in another attempt, an officer and six men having been landed, the vessel was again blown off, and did not return to the island until after sixteen days; and then several days were employed in sailing round the island, and in endeavors to find the part of the crew left on shore; but they were not to be found. Captain *Lambert* finally concluded to abandon his sealing voyage, at least for the residue of the winter, in the southern latitudes, with an intention, as he then thought, of resuming it in the spring; and he accordingly sailed for the *Isle of France*, where he arrived August 18th, 1805.

At the *Isle of France* Captain *Lambert* endeavored to get the brig into some employment; and on the 28th of September chartered her to *Joseph M. Slanesbury*, of *New York* * and [* 310] *Israel Israel, Jun.*, of *Philadelphia*, to carry a cargo of brandy, wine, and oil to *Bombay*, and to return to the *Isle of France* with such cargo as they should put on board. Upon making this engagement Captain *Lambert*, as appears by one of his letters referred to, relinquished all intentions of resuming a sealing voyage; retaining, however, some intention of attempting an oil voyage, if he could obtain the necessary outfits upon his return from *Bombay*

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The implements, utensils, equipments, and provisions, remaining of the outfits for the sealing voyage, having been landed at the *Isle of France*, part of them were sold there; and the residue were left in the care of *John H. Cabot*, excepting only about five hogsheads of salt, which, being stowed in the run of the vessel, it was thought not convenient to land, and provisions for four months, which were taken or retained on board as necessaries for the voyage to *Bombay*

The merchandise taken at the *Isle of France*, pursuant to the charter, was stated to Captain *Lambert*, and believed by him, to be articles of a cargo recently brought there from the *United States* in the ship *Projector*, in which said *Slanesbury* had arrived as supercargo; Captain *Lambert* having had information of such an arrival, and having noticed that the boxes of claret, among the articles offered for his lading, retained the mark "*Projector.*" — On the 3d of October Captain *Lambert* sailed in the brig *Liberty* from the *Isle of France*, bound for *Bombay*, with the said *Israel* as supercargo, and with the merchandise above mentioned belonging to the freighters, and with the said salt and provisions, the property of the insured; and the next day they were captured by the *British* frigate *Duncan*, *Clement Sneyd* commander, and ordered to *Columbo*, in the island of *Ceylon.*

The register, sea-letter, and *Mediterranean* passport of the said brig had been left at the *Isle of France* when Captain *Lambert* sailed for *Bombay*, by an accident, as it appears from his testimony, and that of *J. H. Cabot*, with whom the papers were deposited; and when boarded from the *British* frigate, such papers as they [* 311] had in their brig were * produced and shown, and the accident by which the other papers had been left at the *Isle of France* was stated, and on this point the captain of the frigate appeared to be satisfied, and said that the vessel and cargo were clear enough, and might proceed. Then it was suggested to him by his lieutenant, that *Columbo* was in the way to *Bombay;* and it might be best to send the brig in for examination; and after the assent of the crew of the frigate had been obtained, the detention was determined on. But for what particular cause, and whether for any other cause than the want of papers, did not appear otherwise than as stated.

At *Columbo* the brig and cargo were libelled, condemned, and sold for the benefit of the captors, before Captain *Lambert* left the place.

The cause of the condemnation alleged in the admiralty proceedings is, "He, the said *Jonathan Lambert*, being a citizen of the *United States of America*, and master of the said brig, having during the voyage in which the said brig was captured as aforesaid,

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carried on, and being at the time of the capture thereof carrying on, an illicit trade between the *Isle of France*, a colony of the *French* government, and *Bombay*, a colony of *Great Britain;* and on account of the cargo belonging to persons inhabiting within the territories of the *French* Government; and that the said brigantine and cargo were therefore or otherwise subject, &c., as good and lawful prize."

On the 30th of January, 1806, in consequence of intelligence of the capture by the British, received in a letter from Mr. *Otis*, who had been the mate of the said brig, and had quitted her at the *Isle of France*, the insured abandoned their interest in the brig and cargo and outfits to the defendants, and accompanied the abandonment with a copy of the said letter. The abandonment having been refused, the said protest by Captain *Lambert*, received by the insured on the —— day of ——, was then offered to the defendants in confirmation of the said intelligence.

*A usage for vessels employed in the south seas in [* 312] sealing and oiling voyages, to go to the *Isle of France*, and to seek employment there, during the winter season of the southern latitudes, with the intention of resuming their original destination on the return of temperate weather, was also proved. And it was agreed by the parties, that the Court of Appeals in *England* had reversed the said sentence of the Vice Admiralty Court, and had decreed a restitution of the said vessel and cargo.

Upon this evidence the jury were directed, that the delays and other circumstances, proved in the conduct of Captain *Lambert*, while in the south seas, and in proceeding to the *Isle of France*, did not operate to discharge the underwriters, or amount in any respect to a deviation from the voyage insured; and that the voyage and employment of the said brig, undertaken at the *Isle of France*, if not unlawful according to the alleged causes of condemnation, were within the risk insured; and that the insured were entitled to recover for the loss proved, notwithstanding the accident of leaving the vessel's papers at the *Isle of France;* and even if that circumstance had produced the detention of the vessel in the first instance; and, reserving the question whether the voyage to *Bombay* was unlawful, and a justifiable cause of condemnation, the verdict was taken for the plaintiffs, in which the damages were assessed for the vessel according to the valuation in the policy, and for the articles the property of the plaintiffs on board according to the amount and value proved; the counsel for the plaintiffs assenting to the opinion of the judge who sat in the trial, that after the landing of a part of the outfits for the sealing voyage at the *Isle of France*, the policy became an open policy as to any remaining part of the cargo and outfits on board the vessel at the time of the capture.

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The cause was argued at this term by *Prescott* for the plaintiffs, and *Dexter* for the defendants.

Dexter stated three grounds, on which the defendants resisted the right of the plaintiffs to recover in this action —1. That [* 313] there was a deviation from the voyage insured. *2. That the loss was imputable to the vessel's being found without the documents requisite to prove her neutrality. 3. That the voyage to *Bombay* was illicit, and a justifiable cause of condemnation.

1. Although, from the very remarkable description of the voyage in the policy, it might be thought impossible that a deviation could take place, yet the whole facts in the case show — and such is well known to have been the understanding of the parties to the contract — that the insurance was made upon what is known here under the name of an oiling and sealing voyage; and the policy was intended to cover the property while employed in the usual course of such a voyage, which it was not easy to describe in terms which should comprehend every part of it. Without this or some similar explanation, the policy would cover the vessel, and any cargo she might have on board, during her existence as a vessel. The vessel in this case was then bound to pursue the usual course of voyages of this description. The usage proved is, for vessels to go to the *Isle of France*, and there seek employment during the winter months in southern latitudes. The winter may be considered as commencing in those latitudes in May or June. Yet the vessel loitered, in this case, about the *Prince Edward* Islands, without any object, and exposed to imminent hazard for want of a harbor, until August, the last winter month. It was a deviation not to go to a place of safety, when practicable, before the storms of winter should come on. Again, the usage proved is, to seek employment at the *Isle of France* during the winter; but this vessel commenced her voyage to *Bombay* in the spring, and must have then relinquished all thoughts of pursuing further the sealing and oiling business, in which employment alone, and the usages connected and consistent with it, the policy attached to the vessel and outfits.

2. The leaving the papers, constituting the evidence of the vessel's neutrality, was a sufficient and probably the real [* 314] cause of her detention and condemnation. If this * may be denominated an accident, it can hardly be called an inevitable one. It was gross negligence in the master, among whose primary duties it was to keep constantly on board those documents which are so essential, in a period of war, to prove the neutral character of the ship and her lading. Here was an implied warranty of neutrality; and it belongs to the nature of such a warranty,

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not only that the property of the ship be neutral, but that she be so *to the purpose of being protected*, or, in other words, that she have all the requisites to entitle her to the privileges and immunities of ships belonging to the neutral state, whose rights she claims, and this during every part of the voyage. (1) Without such documents a ship is not seaworthy, and underwriters are not held.

3. A sufficient cause of capture existed in this case, arising from the illicit commerce which the vessel was found carrying on. The trade of foreigners with the British East India colonies is wholly interdicted, except where a treaty has stipulated its allowance. But the treaty of 1794, under which citizens of the *United States* carry on this trade, restricts it to a direct trade between the *United States* and the colonies. (2) It may be objected that the reversal of the decree of condemnation has deprived the defendants of the benefit of this argument. This observation would have more weight, if the Courts of Admiralty were not known to be more subject to the views of their respective governments, and of course more influenced by political considerations, than courts of another class. It may be true also that the same evidence was not before the Courts of Admiralty as is furnished in the present case.

Prescott thought it extravagant to object a deviation under a policy of insurance so uncommonly liberal in its description of the voyage insured as this. The plaintiffs certainly intended to protect themselves in the undertaking and prosecution of what the French term little voyages. There is in fact no limit in the policy as to time or place, *excepting only the com- [*315] mencement of the risk at *Salem*, and the completion or ending of it at the arrival of the ship at her port of discharge in the *United States*. But supposing that the assured were confined, by the spirit of the contract and the understanding of the parties, to the precise object of a sealing and oiling voyage, still there was no deviation. The object was kept steadily in view, and pursued as far as the funds would support it; and the voyage to *Bombay*, which seems most to be relied on to establish a deviation, was undertaken for the purpose of procuring funds for the main purpose of the voyage during the following season.

As to the loss of the ship's papers, by which she is said to have lost her neutral character, it may be answered in the first place that here was no warranty of neutrality, nor any representation to that effect, except so far as the fact might be inferred from the assured being known as neutrals to the underwriters. All the positions cited from *Marshall* relate wholly to cases of express warranty. Where there

(1) *Marshall*, 317, 319. (2) *Art.* 13.

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is no express warranty, nor any representation of neutrality, nor even unless there is an undertaking to that effect contained in the policy itself, there is no obligation on the assured to be furnished with documents of neutrality; but the underwriter takes upon himself all risks, belligerent as well as neutral. (3) Nor is the want of such documents a sufficient and legal cause of condemnation, even when a ship sails originally without them; much less when, by accident, as in the case at bar, they are merely lost or mislaid. If they constitute a part of what goes to make up the sea-worthiness of a ship, yet it was never known that where a ship, at the commencement of her voyage, was sea-worthy, and became otherwise by accident in the prosecution of her voyage, that underwriters were thereby discharged from a loss accruing in consequence of such an accident. Here the documents were as much lost by an accident, as if they had been blown overboard, or had perished
[* 316] from being wet. Such accidents * are within the contemplation of every party to a policy of insurance; and wretched indeed would be the condition of the assured, if unavoidable accidents were held sufficient to avoid the contract which was intended to protect and indemnify them.

As to the point of illicit trade —— Here *Prescott* was informed by the Court that he need not argue this point.

The action stood continued *nisi* after the argument, and at the following March term in *Suffolk*, the opinion of the Court, (except the *Chief Justice* and *Thatcher*, J., neither of them having been present at the argument, and *Sewall*, J., dissenting,) was delivered as follows by

SEDGWICK, J. There are several objections made, as reasons why judgment should not be rendered on the verdict found in this case.

The first, as I understand it, is founded on the unusual terms of the policy, as descriptive of the voyage insured. The insurance, in this respect, is certainly unusual; and, as far as I know, altogether singular. It is a valued policy on the brig *Liberty*, her cargo and outfits, "at and from *Salem* to any port or ports, place or places, backwards and forwards, round the globe, one or more times, during her stay and trade at all such places, until her return to her port of discharge in the *United States*."

It is said that this description is so loose and indefinite, that it does not come within the principle that *the commencement and termination of a voyage insured must be expressed in the policy.* This

(3) 7 *East's Rep.* 367, *Dawson & Al.* vs. *Atty.* — 2 *Johns. Rep.* 157, *Elting & Al.* vs. *Scott & Al.* — 1 *Caines's Rep.* 217, *Burnewall* vs. *Church.*

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rule is deduced, as I understand, from the doctrine laid down by *Molloy*, (*B.* 2, *c.* 7, § 14,) that if a ship be insured from *London* to ————, (a blank being left to prevent a surprise by an enemy,) and in her voyage, she happen to be cast away, although there be private instructions for her port, yet the insured must sit down by the loss, *by reason of the uncertainty.* And to this principle it is understood that the usage of merchants has conformed.

* I think the doctrine of *Molloy* is sound and reasona- [* 317] ble; but I do not think that this is a case within it.

Here the commencement and termination of the voyage are expressed. The commencement is "at and from *Salem*," and the termination is the "port of discharge in the *United States.*"

It is said that, according to this understanding, the insurance would continue during the life of the vessel; and that this could not be the meaning of the parties. But why could it not? It is to be remembered, that during the intermediate time, it was the duty of the assured to keep the vessel tight, stanch, and strong; and that if she should become unfit, from a want of sea-worthiness, to commence and perform any voyage she might undertake, the underwriters would be discharged. Upon this condition, which attaches to every contract of this kind, the defendants were willing to assume the risk they did, at a premium of nine per cent. *per annum.* And I see nothing, in the nature of the transaction, why it was not competent for the parties to enter into such a contract; and more especially, when it is considered that the insurance on the "cargo and outfits," when the outward cargo was broken up, would cease to be a valued, and would become an open policy.

It is further said that the voyage insured must be understood as intending a voyage to take seals; and when that business was accomplished, to return to the *United States.* — If such were the intention, it might and ought to have been expressed; whereas, in the words the parties have used, there is nothing from which such an intention can be collected, but the contrary. Instead of such a voyage, the assured were at liberty to go "to any port or ports, place or places, backwards and forwards, round the globe one or more times."

It was further insisted that from the whole evidence it is manifest that it was known to the parties, that one object of the voyage, at least, was the taking of seals in the south seas. This is admitted; and it is said that the arrival at *Prince Edward's* Islands, the intended place of this business, * the latter part of [* 318] May, or the beginning of June, being the winter season in that latitude of the globe, was an improper season, and that this

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manner of performing the voyage discharged the underwriters. I assent to the principle, on which this objection is founded. It is, that in contracts of insurance, the voyage is to be performed in such a manner, that the underwriters are responsible for no extraordinary risks, which were not contemplated, and which may be unnecessarily incurred. I am not sufficiently acquainted with the facts, to determine whether that was the case in this instance; but I think it is a sufficient answer to this objection, that this purpose of the voyage was known; that the policy was dated the 30th of October, when it is to be presumed the vessel was at *Salem*, preparing for her voyage; and that she sailed in the ensuing November. The time of her sailing, then, and her consequent arrival at her port of destination, cannot be objected to by the defendants; as they must be presumed to understand the circumstances of the voyage insured, and to assume the *ordinary* risks attending it.

Another objection made to the plaintiff's right to recover is, that there was a deviation. This objection, as to the strict, literal meaning of deviation, was in this case hardly possible; for, as has been already shown, the assured were protected by this policy in going to all ports and places, backwards and forwards, and round the globe, as often as they pleased.

But it is said, here was delay, in the nature of deviation, which will avoid the policy. — It is difficult to conceive how mere delay, or sailing in one direction more than another, when the assured had a right to sail any where, should discharge the underwriters. This insurance, as to its termination, was not an insurance upon time; for it was to terminate whenever the brigantine should arrive in the *United States*. It was not an insurance of any definite voyage or voyages. It was anomalous, — authorizing the assured to go to any and every part of the globe; and
[* 319] * in every place equally protecting the property, wherever it might be, unless greater than *ordinary* danger was unnecessarily incurred. Such a case seems to exclude the possibility of a deviation merely by delay, or by sailing in pursuit of any unlawful commercial object.

But in this case I do not perceive any unnecessary delay. After being unsuccessful in the endeavor to take seals, on *Prince Edward's* Islands, they sailed for the *Crozette* Islands; but, after searching a month, were unable to find them. There is no evidence, by which it can be inferred, that this was owing to the ignorance or want of skill of the master. The residue of the time, until the brig sailed for the *Isle of France*, was consumed in regaining *Prince Edward's Islands*, after being blown off, and in attempts

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to get water, and to find men, who had been sent on shore for that purpose.

Another objection arises from a note at the bottom of the policy, by which the underwriters were to be exempt from "any loss that might take place for illicit or contraband trade, with or by any person whatever."

It would be impossible to get over this objection, did the case rest solely on the capture, and the decree of the Court of Vice Admiralty at *Columbo*. But that decree, which condemned the vessel for carrying on illicit trade, was reversed by the Court of Appeals in *England*, and restoration ultimately decreed; so that there is a final decree, in a court of the captors, that the charge of illicit trade could not be supported, as a ground of condemnation; and this is a conclusive answer to this objection.

The last objection is, that the leaving of the papers at the *Isle of France* (which is said to have been the cause of the capture) was the fault of the master; and that for this the underwriters are not responsible.

The question, whether the want of papers was the cause of the capture, was not ascertained by the jury; it not being put to them. But from the facts, which are reported, there is reason to believe that to be the case. There is no * sugges- [* 320] tion of any fact, from which it can be inferred that the capture was for any other cause. The want of papers was noticed by the commander of the frigate; and although he appeared to be satisfied on this point, by the account which the master of the brig gave of the cause of the accident by which the papers were lost, yet the suggestion of the lieutenant, that *Columbo* was in the way to *Bombay*, and that it might be best to send the brig in for examination, seems to have no other foundation than the want of papers. When the brig was carried in, she was, contrary to the expectation of the commander of the frigate, condemned.

The important papers, which were left behind at the *Isle of France*, were the sea-letter and the register; for I make no account of the Mediterranean passport. The sea-letter specifies the nature and quantity of the cargo, the place from which it comes, and its destination. The register is the evidence of property, and shows that the vessel really belongs to a neutral country. Although, by the law of nations, the want of documents, which are usually provided for vessels, and ought to be on board of them, will not amount to *conclusive evidence* against a vessel's neutrality, because not absolutely inconsistent with it; yet prudence requires that they should always be at hand, when necessary to prevent a capture from a

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suspicion, which may justly be excited by a want of them. For even *Hubner* (Part 1, *c.* 3, § 10) admits that the proof of property, which in this case is the register, is so essential to every neutral vessel for the prevention of frauds, that those which sail without it have no reason to complain, if they are interrupted in their voyages and their neutrality disputed.

There was, then, in this case, a reasonable ground of capture; although, as is proved by the final decree, there was none of condemnation. There is great reason to believe that this capture was for want of papers; and if that excuses the underwriters, it is important that it should be ascertained; and that question depends upon this, whether a capture for want of papers, which
[* 321] might be and ought * to be on board, is within the contract of insurance as a peril insured against?

The only loss, for which a remedy is sought in this case, was occasioned by the capture; and in deciding on the merits of the action, it is proper that we should assume it as a fact, that the capture was occasioned by the want of papers, provided that will discharge the underwriters. For that purpose the case ought to be sent to a new trial, because at present we are ignorant of a fact, material to be known to decide on the merits of the cause.

The rule of construction in this case is laid down by *Park* (4) with great accuracy. He says, "Although courts in this case, as in all others, will endeavor to give effect to this species of contract, by a liberal and equitable construction, yet they will be cautious not to extend the principle of construction so far as to say that the acts of the parties shall be made to operate beyond their intention; and therefore they will attend to the words of the contract, and see that the loss, which has proved to have happened, is really one of those risks against which the underwriter has insured."

Let it be again remembered that the ground, on which we proceed in this investigation, is that the capture, which is the cause of the loss, was in this case occasioned solely by the want of papers, which had been in the possession of the master, and which, through his neglect, were left behind at the *Isle of France*. It cannot be pretended that this *neglect* is a risk *expressly* insured against. It is not a peril of the sea; it is not a detention by a superior force; it is not an assailing of thieves, nor any other risk assumed by the insurer; and if it rests upon him, it must be by implication resulting from the nature of the transaction.

It is the duty of the owner to see that he intrusts the property

(4) Page 61, 62.

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insured with a man of competent skill, prudence, and discretion. He is responsible for all losses or damage to the goods committed to his charge, which arise from his negligence, ignorance, or wilful misconduct; and, as he is *responsible to the [* 322] owner in all such instances, the underwriter is not in any of them, excepting only in such cases of wilful misconduct as amount to barratry, when that is specially insured against by the underwriter. Now, it was owing solely to the negligence of the master, in the case under consideration, that the papers were left behind at the *Isle of France;* and the consequence seems irresistible, that if that was the cause of the loss, the underwriters are not responsible.

The principle of an implied warranty on the part of the assured, that every thing shall be done to prevent a loss, pervades the whole subject of marine insurance; or, in other words, that the insurer shall be responsible for no loss, but such as is occasioned by some of the perils, which, according to a fair construction of the contract, was in the understanding of the parties insured against. Hence is the principle, that the insurer shall answer for no loss resulting from the gross negligence or ignorance of the master, or from the want of a competent crew; hence, also, the insurer is not liable for any loss or damage, which may happen to goods from any fault or defect of the ship, not arising from the violence of the wind or sea, or from an accident or misfortune in the voyage, but from some latent defect before she sailed; hence, too, there is an implied warranty that the ship shall proceed in the usual and common route, and therefore a deviation from it discharges the underwriter.

To show the obligation which rests on the assured, his duty in the case of a ship warranted neutral is remarkable, and analogous to the case before us. In such case it is a settled rule, that the assured, in order to comply with his warranty, must not only maintain the property to be neutral, but so conduct himself towards the belligerent parties, as not to forfeit his neutrality. He must pursue the conduct, and preserve the character of a neutral; and for that purpose must furnish himself, and keep in his possession, the ordinary evidence of his neutrality; unless *deprived [* 323] of it by some inevitable misfortune. Now, I cannot distinguish that case from this, as to the obligation which rests on the assured.

To show with what strictness the assured are holden to perform whatever is incumbent on them, as means of safety to the property insured, the case of *Law* vs. *Hollingsworth* (5) is directly in point.

(5) 7 *D. & E.* 160.

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In that case the loss happened in sailing up the River *Thames*. No pilot was taken on board; and it was determined that this neglect discharged the underwriters; although it did not appear that the loss was directly imputable to a want of skill in those who navigated the vessel; because the assured cannot recover, unless they equip the ship with every thing necessary to her during the voyage. The great principle, on which every case of this kind ought to turn, is laid down in that case very concisely and perspicuously by the court. Lord *Kenyon* said, that "the assured cannot recover on a policy of assurance, unless they equip the ship with every thing necessary to her navigation during the voyage; the ship herself must be sea-worthy; she must have a sufficient crew, and a master and pilot of competent skill."

The case under consideration is much stronger than that of *Law* vs. *Hollingsworth*, inasmuch as in *that* the negligence of the captain was not the cause of the loss, but in *this*, but for the negligence of the master, no loss would have happened. (*a*)

The case of *Rich* vs. *Parker* (6) was determined on the same principle. — In that case the ship was warranted to be *American* property. She was so in fact. She had not on board a passport, as required by the treaty between the *United States* and *France*; and although the ship suffered no inconvenience for the want of such passport during the voyage, yet it was determined that not having it on board discharged the underwriters. The same principle had previously governed the decision of the court in the case of *Barzillai* vs. *Lewis*, (7) as it did also in that of *Farmer* vs. *Legg*. (8)

[*324] *I will mention only one case more — that of *Denison* vs. *Modigliani*. (9) After the ship and cargo were insured, the assured requested of the underwriters leave to take out a general letter of marque. This was refused, but afterwards taken out. The court decided that this avoided the policy, although the loss was not occasioned by it. It is true, that this decision is called in question by *Marshall*, (10) and perhaps with good reason. He does not, however, deny the principle upon which it was determined,

(*a*) [The case of *Law* vs. *Hollingsworth* did not proceed on the ground of negligence, but of unseaworthiness. (1 *Marsh. Ins.* 3d ed. p. 160.) In *Rich* vs. *Parker*, and *Barzillai* vs. *Lewis*, the warranty was not complied with by the assured. (1 *Marsh.* 412—420.) In *Farmer* vs. *Legg*, the ship was not navigated according to law. (1 *Marsh.* 171, 3d ed.) *Denison* vs. *Modigliani* was decided on the ground that the risk had been changed, or altered, after the execution of the policy, without the consent of the underwriters. (1 *Marsh.* 285, 3d ed.) — ED.]

(6) 7 *D. & E.* 705. (7) *Park*, 358. — *Marsh.* 323, *S. C.*
(8) 7 *D. & E.* 186. (9) *Marsh.* 194. (10) *Marsh.* 194, 195.

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but its application. The principle is, that the assured shall do nothing, by which the risk insured against shall be increased; but *Marshall* thinks that the taking out of the letter of marque did not increase the risk.

By these cases, the respective duties of the underwriters and the assured seem to be clearly pointed out. The underwriter is to indemnify for any loss, which fairly takes place from any of the risks insured against; and the assured is to see to it, that the insurer is exposed to nothing beyond those risks; and that they shall not be increased by his own misconduct or negligence, or that of the master or crew. And the underwriter in those cases is discharged, although the misconduct or negligence is not the cause of the loss. This principle governed all the cases which I have cited or referred to upon this point. They are, therefore, much stronger than the case before us; for here the negligence of the master, in leaving the papers at the *Isle of France*, was the cause, and the sole cause, of the loss.

There were two cases cited in the argument, which were supposed to be in opposition to the rule, which I have endeavored to establish. In the case of *Dawson* vs. *Atty*, goods were insured on board a certain ship generally by her name, without any addition of country, and she was not represented to be of any particular country at the time the policy was subscribed; although she was in fact an *American*. * It was determined, that it was not necessary that she should be documented as such; and that in case of capture by a foreign state, for want of the documents required by a treaty between that state and her own, the owner of the goods may recover against the underwriters. In that case it was evident, that the neutrality of the vessel was not a consideration with the underwriter, who was willing to assume the risks independently of that circumstance, and there was no opinion of the court why he should not be holden by his contract. [* 325]

In the case of *Elting & Al.* vs. *Scott & Al.*, the court, although they did not incline to give a decisive opinion, were inclined to believe, that when the national character of a vessel is not warranted or represented, it is not incumbent on the assured to show that he had a sea-letter, or other papers required by the laws of the country, or by treaties with foreign nations. Even an inclination of opinion by that court is entitled to respect; but it is sufficient to observe, that the case referred to differs widely, in its prominent features, from the case before us. Here the inquiry is, whether a loss, which was occasioned solely by the negligence of the master, be a loss for which the underwriters are responsible, as being a risk

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insured against. I cannot think it is, and am therefore of opinion that there should be a new trial. (*a*)

New trial ordered.

Note. After the above opinion was pronounced, *Sewall*, J., observed, that he did not concur therein, but thought it unnecessary then to give at large the reasons of the opinion he entertained in the cause, as the action might, probably, come again before the Court, after the new trial should have been had

(*a*) [The rule, that a loss, the proximate cause of which is a peril insured against, is a loss within the policy, although the remote cause may be negligence of the master or mariners, has been affirmed, both in the English courts and in the highest judicial tribunal in the United States. — *The Petapsco Ins. Co.* vs. *Coulters*, 3 *Peters*, 230. — *Busk* vs. *The Royal Assurance Co.*, 2 *B. & A.* 73. — *Bishop* vs. *Pentland*, 7 *B. & Cr.* 214. — 1 *M. & R.* 49, *Shaw* vs. *Robberts*, 1 *N. & P.* 279. — *Dobson* vs. *Sotheby*, 1 *M. & M.* 90. — ED.]

[* 326]

* EPHRAIM TITCOMB *versus* THE UNION MARINE AND FIRE INSURANCE COMPANY.

Where an act incorporating an insurance company prescribed a particular manner in which the shares of members in the stock were to be attached and sold on execution, it was held, that such provision superseded the general provision on the same subject contained in the previous statute of 1804, c. 83.

THIS was an action of the case, in which the plaintiff declared, 1. For not transferring to him fifteen shares in the stock of said company, purchased by him, and which having become his property, the defendants had undertaken to have transferred. 2. For not paying dividends on fifteen shares when purchased. 3. For not paying 3000 dollars, money received by the company for the use of the plaintiff.

The defendants pleaded that they never promised, &c., on which issue being joined by the plaintiff, a trial of the issue was had before *Sewall*, J., at the April term of this court, 1810.

For the plaintiff, the evidence at the trial was, that on the 7th of April, 1809, *P. Bagley*, a deputy sheriff, having an original writ in a suit of *Samuel Williams* against *John Wood*, *Joseph Cutler*, and *George A. Rogers*, returnable to the Court of Common Pleas for this county, June term, 1809, inquired at the office of the said company for the shares of the original stock of the company holden by

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said *Rogers*; and notwithstanding information stated to him by *J. Balch*, their secretary, that *Rogers* held no shares there, excepting the interest he might have in fifteen shares, which had been transferred to the company as collateral security for his note due to the company, the said *Bagley* gave notice at the office that he attached the said number of shares as the property of *Rogers*, and returned upon the said writ that he had attached the same. — Judgment for the sum of 4900 dollars and costs being afterwards recovered in the said suit, an execution to satisfy the same was returned by the same deputy sheriff. By the said return it appears that on the 21st of July 1809, the said fifteen shares were levied and taken, and on the 22d of August, next following, were sold at vendue to the plaintiff at five dollars per share; *and on [* 327] the 4th of September then next, the said *Bagley* left a copy of the said execution and return at the office of the said company; and the plaintiff, being then there, tendered to their secretary his reasonable fees for recording a transfer of the said shares, and demanded to have the same entered, and to have certificates of the shares in his own name, all which was refused.

The act for incorporating the said company (*Stat.* 1806, *c.* 89.) was read, as was also a copy of the supposed transfer to the said company, received by the said *Bagley* when he made the said attachment, and of a certificate which was endorsed thereon by the said secretary. — (The said transfer purports a conveyance of fifteen shares of the stock from *Rogers* to the company, as collateral security for the payment of his note of even date to *T. Cross*, and by him endorsed, payable in sixty-five days; and also for the payment of such notes as he may give by way of renewal of the said note, or any part thereof, and of any other sums he may owe the company. — In default of payment of such notes or other debts, he authorizes a sale of the shares at auction after public advertisement, a transfer of them to the purchaser, and the appropriation of the proceeds to the payment of the notes or debts, and the surplus to himself; and finally engages to surrender the certificates of his shares; reserving a right to act and vote as a stockholder until such sale shall have been made. Dated February 1st, 1809. The secretary certifies that *Rogers* was, before the said transfer, holder of fifteen shares; that there was no dividend due on them; that the note mentioned in the transfer remained unpaid; that the transfer was immediately noted, as was customary, in the books of the company; and that *Rogers* had never been required to give up the certificate of the shares, on the presumption that the note would be duly paid and the certificate restored.)

For the defendants, the evidence was, that the usage of the com-

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pany, since its incorporation, had been, (they having no
[* 328] by-laws upon the subject of transfer, or any express * by-laws at all,) in all absolute transfers of stock, to have the same entered and signed by the party making the transfer, in a book kept for that purpose, of which a statement is then made in the day-book to the debt of that party, and to the credit of the party to whom the transfer is made; which is afterwards accordingly posted in the leger. But in occasional transfers of stock, of which there had been no example other than transfers to the company for collateral security, the usage had been for the stockholder to make his transfer upon a sheet of paper, to be kept on file, and in a form similar to that of which a copy was given to *Bagley*; after which an entry is made in the day-book and leger, as in the case of an absolute transfer. — On the 1st of February, 1809, the company held the note described above in the secretary's certificate, which was deposited with them by *Rogers*, and was the balance of a former note given in discharge of his subscription of twenty-five shares to the stock of the company, and which had been before several times renewed on the deduction of sundry payments made by him; and on the said 1st of February, 1809, *Rogers* transferred fifteen shares, as above, being all he then owned. The day-book of the company being produced at the trial, an entry appears therein made on the same day as follows, *viz.*: "Sundry accounts dr. to the capital for shares transferred to the co. as collateral security for debts due from the persons hereafter named, as per transfer." After which are inserted many names, with the number and amount of their shares transferred; and among the rest is the name of "*George A. Rogers* fifteen shares, 1500 dollars." — Afterwards, on the 26th of April, 1809, his note not having been paid, said shares were sold at vendue, pursuant to the authority and trust declared in the said transfer. Ten of them were purchased by *M. Hall* at 99 dollars per share, and five of them by *J. Greenleaf* at 100 dollars per share.

The sale had been ordered on the 10th of April, and had
[* 329] been advertised more than fourteen days; and on * the 27th the president of the company transferred the said shares to the respective purchasers. Afterwards, at the sale by *Bagley* under the execution, the president of the company read to the persons assembled at the auction the minutes of the said transfer by *Rogers*, and of the sale pursuant thereto, and cautioned all persons against purchasing; and the plaintiff's purchase was made with a full knowledge of the foregoing transactions. It was admitted on the part of the defendants, that *Rogers* retained his certificate of stock until May 8th, 1809.

Upon this evidence a verdict was taken for the plaintiff for 1560

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dollars, subject to the opinion of the Court; and if their opinion should be that the action was not maintained upon the facts above stated, the verdict was to be set aside, and the plaintiff to become nonsuit.

The cause stood continued to this term, when it was argued by *Story* and *Mosely* for the plaintiff, and by *Putnam* and *Banister* for the defendants.

For the defendants, it was objected, in the first place, that the sale by the deputy sheriff under the execution was not legal. The statute of 1804, *c.* 83, concerning the attachment on mesne process and selling by execution shares of debtors in incorporated companies, provides, in the second section, that an attachment of such shares shall hold the same until thirty days after judgment, and no longer; within which time an attested copy of the execution must be left with the clerk, &c., of the company, and an advertisement of the time and place of sale be at least once published, both which are necessary to perfect the lien created by the attachment. — Or if the shares are seized on execution without previous attachment, the first section of the statute requires a copy to be left, and advertisement made in the same manner.

Neither was the sale in this case within the provisions of the act incorporating the defendants, the eleventh section of which authorizes the levy of an execution upon *the [* 330] shares, and a sale thereof in the same manner only as is by law prescribed, where personal estate is taken in execution Now, the sale was not at all in conformity to the directions of the general statute of 1783, *c.* 57, respecting the sale of personal property on execution, which is the law referred to in the act of incorporation.

In any view of the subject, then, the sale was void; the plaintiff obtained no title to the shares, and therefore cannot maintain this action.

It was also contended, and argued at much length by the counsel for the defendants, that the title of the company to the shares in question, under *Rogers's* transfer to them, was good and valid, and paramount to the title derived from the posterior attachment and sale of them to the plaintiff, even if these had been perfectly regular. But as the decision of the Court finally rested only on the regularity of the sale by the deputy sheriff, the arguments for the defendants, as well as the answer to them on the part of the plaintiff, bearing upon the other point, are omitted.

For the plaintiff, it was insisted that the sale was conformable to the statute of 1804. *c.* 83, which in its terms applies as well to corporations created after as before its enactment. The provisions of

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this statute are more favorable to the debtor than those in the charter, as to the sale of the shares; and as there is no repealing clause in the latter act, justice would be fully done by considering them as coëxisting modes of executing process, and not as contradictory. Probably the clause in the charter was inserted by mistake.

To the objection that it did not appear, by *the return of the officer*, that a copy was left and advertisement made, it was answered, that the provision is barely in affirmance of the law as existing before that statute; that by comparing the first and second sections of the statute, it will appear that the leaving a copy of the execution is only required where there is a previous attachment; and that the intention was to protect intermediate *bonâ fide* purchasers before execution executed.

[* 331] Further, the clause could only operate in case of an intermediate purchaser *bonâ fide*, because the first section required that a copy of the execution and return should be left with the company; and a previous notice to them would be useless, as they could have no interest to be affected by such notice, and no mischief could arise to any party. — It is also stated in the officer's return, that he *took the shares in execution*; and it is a regular inference, that he did every thing necessary to the seizure, and of course left a copy with the company.

But even admitting that the execution has been irregularly executed, still, however, it may be as between the officer and the judgment debtor — a purchaser of chattels at a sheriff's sale is not affected by the irregularity, even as against the judgment debtor; and *a fortiori*, not against mere strangers, as the company are. A purchaser is protected, although the judgment be reversed for error, (1) and where, too, the execution has issued irregularly, as if a *fieri facias* issues after the party is in execution on a *capias ad satisfaciendum*. (2) By the seizure of chattels in execution, the property is divested, and is in the sheriff; and if he seize to the value, the execution is satisfied, although no return be made. (3) And by analogy in this case, by the seizure the property of the shares was in the sheriff; and his subsequent sale, however irregularly made, would convey the title.

The action was continued *nisi* for advisement, and at the next March term in *Suffolk* the opinion of the Court was pronounced by

SEWALL, J. The controversy between these parties is respecting certain shares, originally subscribed by *George A. Rogers*, in the stock of the corporation, the defendants in this action. Fifteen of

(1) 5 *Co.* 90. — *Dyer*, 363. — *Yelv.* 180. — *Cro. Jac.* 246.
(2) *Jeanes* vs *Wilkins*, 1 *Ves.* 195.
(3) 1 *Lev.* 282. — 6 *Mod.* 290. — 2 *Roll.* 57. — 4 *Mass. Rep.* 402.

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twenty-five shares subscribed by *Rogers* were sold by the directors of this corporation on the 26th of April, 1809, and the proceeds applied to the payment of a note, in which the said *Rogers* was indebted to the corporation for certain instalments of money due upon * his subscription. — The corporation attempt [* 332] to justify this sale, having proceeded in making it, in consequence of a written transfer of the said fifteen shares, executed by the said *Rogers* on the 1st of February, 1809. This transfer was understood between the parties, and was entered in the books of the corporation, as a collateral security of *Rogers's* note due them for the sum of 1900 dollars, the balance of his subscription, dated on the same day, and payable in sixty-five days. This sale was ordered on the 10th of April, upon the authority and trust declared in the transfer to the corporation; and on the 27th the president of the corporation completed the transfer, and gave certificates of those shares to the several purchasers thereof at the vendue holden the preceding day.

That the purchasers of these shares have acquired a title to them against the company, and against all persons claiming under *Rogers*, seems to be conceded by the present form of action, and to be consonant to the decision of this Court, in the case of *Gray* vs. *Th. Portland Bank.* (4)

By the action in the case at bar, the defendants are charged in damages, — 1st. Upon the implied undertaking to admit the transfer of the fifteen shares in question, which the plaintiff avers to have been duly sold to him, by virtue of an execution against *George A. Rogers*; — 2dly. Upon an implied undertaking to pay the dividends due on those shares when purchased; — and, 3dly. Upon an implied promise to pay the plaintiff the sum of 3000 dollars received to the plaintiff's use. This action is therefore not in the nature of a specific remedy for the shares themselves, as retained by the defendants; but for a sum of money accruing to the defendants, or lost to the plaintiff, in consequence of a misappropriation of the shares in question, or a refusal to appropriate them to the plaintiff. The action is of a new impression, and arises upon a novel provision, and extension of the law of attachments and executions in civil suits, and to satisfy judgments recovered in civil actions.

* In the year 1805, before the existence of the cor- [* 333] poration, defendants in this action, a statute was enacted, (5) directing the mode of attaching on mesne process, and selling by execution, shares of debtors in incorporated companies. By this

(4) 3 *Mass. Rep.* 364. (5) *Stat.* 1804, *c.* 83.

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statute, the shares or interest of any person in any turnpike, bridge, canal, *or other company*, then before incorporated, or which might be incorporated, with all the rights and privileges appertaining to such shares, are subjected to attachment and execution. This statute prescribes the mode of attachment, levy and sale, and the effects thereof.

In 1807 the Union Marine and Fire Insurance Company at *Newburyport*, the defendants in this action, were incorporated by statute (6) into a body politic; and the property of any member vested in the stock is, by the same statute, made liable to attachment, and to the payment and satisfaction of his just debts to any of his *bonâ fide* creditors. The manner in which this provision is to be carried into effect, is prescribed by the statute, differing in several particulars from the mode prescribed by the general statute before cited.

It has been made a question, therefore, in the argument of this cause, whether the attachment and levy, under which the plaintiff must entitle himself to this action, is to be examined by the former and general statute, or by the special provisions of the subsequent statute, the charter of incorporation. — And for myself, I am fully satisfied that this last statute contains the rules, by which the present case is to be decided, as to this point. It admits of some question, I think, whether the former general statute was intended to apply to corporations so dissimilar, in the condition and management of their property, as turnpikes, canals, and bridges are, when compared with banks and insurance companies; and perhaps the *other companies*, mentioned in the general statute, are other like companies, instituted for those definite and permanent establishments, and not moneyed institutions. This doubt is strengthened by the [* 334] circumstance, * that the several statutes, by which institutions for banks and insurance are incorporated, as well since the general statute as before, contains provisions and regulations respecting attachments or executions, by which the shares of members are to be transferred. But whether this may be considered a legislative construction of the term "*other companies*," in the general statute, or not, I think the latter statute settles the rule by which the case is to be determined. A particular mode of attaching shares, and of levying executions upon them, may be considered in the nature of a special privilege, and a designed variation from the general rule.

Without regarding, therefore, the mode prescribed by the general statute, I shall examine how far the rules prescribed by the charter

(6) *Stat.* 1806, *c* 89.

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of this company have been observed, in the attachment and levy under which the plaintiff claims.

The attachment is stated to have been made of *Rogers's* shares of insurance stock, on the 7th of April, 1809, by *Bagley*, a deputy sheriff, upon an original writ at the suit of *Samuel Williams*. The officer inquired at the office of the defendants respecting *Rogers's* shares, and was informed that he had none there, excepting the interest he might have in fifteen shares, which had been transferred to the company as collateral security. *Bagley* proceeded, notwithstanding, to give notice at the office that he attached those shares, and returned an attachment upon the said writ. And the same officer, upon an execution to satisfy the judgment recovered in that suit on the last Monday of June, 1809, has returned that on the 21st of July, 1809, the said fifteen shares were levied and taken by the said execution, and on the 22d of August were sold at vendue to the plaintiff, at five dollars per share. And it appears, that on the 4th of September following, the officer left a copy of the execution and return at the office of the defendants. The plaintiff then demanded to have the transfer to him entered in the books of the company, and to have certificates of the shares in his own name, all which was refused.

*If this were a question with the judgment debtor, [* 335] respecting a property tangible in its nature, and capable of a distinct and visible possession and delivery, the return of the officer would be, I apprehend, conclusive; and the objections made to it would not operate to defeat the purchaser of his title; which would avail, notwithstanding any delays or irregularities in the levying of the execution, or in the proceedings of the officer; no other creditor or claimant having interferred to interrupt his possession. The officer might be liable to any party injured by his negligence or mistake, whether the creditor or the debtor in the execution; and the sale might be, nevertheless, valid.

But the case at bar being with the defendants as trustees to *Rogers*, and as they may have become liable to any other attaching creditor, or to any person to whom *Rogers* may have transferred his shares previous to the sale of them by the officer, I think, independently of the question arising upon *Rogers's* transfer to themselves, and as a general principle applicable to actions of this description, that the defendants are not liable to the plaintiff, unless he can show a clear and indisputable title, under the execution levied by *Bagley*. And in this view of the case, the delay of thirty days after the execution was supposed to be levied, before the officer proceeded to sell, is fatal, I apprehend, to the plaintiff's title. For, by the statute of incorporation, shares taken in execution are to be

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exposed to sale in the same manner as is by law prescribed where personal estate is taken in execution. The time for this purpose allowed and determined by the general statute (7) is four days.

Now, after notice of the levy, when four days had expired, and no sale had taken place, a new notice to the office was requisite, in my opinion, to legalize a subsequent sale. In short, the sale, as it took place, was upon a levy which had ceased, and was to be considered as relinquished, by the subsequent delay and the length of time which had intervened. In this opinion we are agreed; and the consequence is, that this action is not maintained.

[* 336] * We have thought it unnecessary to determine in this action the other question, which has been urged upon the attention of the Court, respecting the validity of contracts between corporations and their members, to secure by their notes subscriptions to the stock. This is a question of very general importance; and it is before the Court in another action, which we are not prepared to decide.

According to the agreement of the parties, the verdict in this case is to be set aside, and the plaintiff is to become nonsuit.

Plaintiff nonsuit

(7) 1783, *c.* 57.

JOSEPH HOYT *versus* ARTHUR GILMAN.

On the trial of an action on a policy of insurance, the judge directed a nonsuit, on the ground that there had been a fraudulent concealment of material facts at the time of effecting the insurance; and the Court refused to set aside the nonsuit, and grant a new trial, observing that if the jury had found a verdict for the plaintiff, they should have set the verdict aside.

CASE upon a policy of insurance for 10,000 dollars on the ship *Ariadne* and her freight from *Falmouth* to her port of discharge in *Europe* — 7000 dollars on the ship, the residue on the freight; the ship valued at 17,000 dollars, the freight at 9000 dollars; policy dated March 5th, 1810; at a premium of twenty per cent. — The first count was for a total loss by the perils of the seas; the second for —— dollars, money had and received by the defendant for the plaintiff's use.

At the trial of the cause, which was had upon the general issue, before *Sewall*, J., at the sittings here after the last November term, the policy was admitted to have been subscribed by the defendant

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for 500 dollars; as was also the total loss of the ship and freight, in the River *Jade*, on the 19th of January, 1810, by the perils of the seas.

It was admitted by the plaintiff, that he had received a letter from *Thomas Dickason & Co.*, of *London*, dated December 8th, 1809, a copy of which accompanied the report of the judge, before the policy was effected; and that he did not give any information thereof to the underwriters, or to his son, *Joseph Hoyt, Jun.*, who was his agent to procure the policy in the case; which letter was of the tenor following, *viz.*: —

* "*London*, 8*th December*, 1809. [* 337]

"*Joseph Hoyt*, Esq.

"Sir,

"We yesterday received a letter from Captain *Richard Hoyt*, of your ship *Ariadne*, informing us his being off the *Lizard* with a freight of tobacco, and was ordered to *Varel*, on the *Jade*; at the same time desiring us to insure on the ship 13,000 dollars, on freight 9000 dollars, on captain's adventure 1000 dollars, which we have not been able to effect; as a very respectable house has received advice from that port of a late decree having been issued by the French emperor, confiscating all vessels and cargoes, entering the *Jade*, *Elbe*, or *Weser*. Of course no one would take the risk; and we have only to hope that Captain *Hoyt* will get information of this decree, previous to his entering the river, and run for *Tonningen*, which at present is open, as far as we know; although it is said *Denmark* would issue a similar decree respecting their ports, which will in a great measure cut up the *American* commerce. The cargo of the *Ariadne* was insured five or six weeks ago. The last premium given to *Varel* was 25 guineas, to return five per cent. for safe arrival. No freight will bear this premium. We beg leave to repeat our hopes and wishes, that your ship may arrive in safety; and as Captain *Hoyt* informs us his freight is to be remitted to us, we shall have great pleasure in informing you when it reaches our hands. Or as any thing relative to your ship is known to us, we shall immediately advise you. We send copy of this in quadruplicate, hoping one or other may reach you early; that in case you can get insured with you, and you wish it, that you may be secured from loss.

"We are on all occasions yours, &c.

"*Thomas Dickason & Co.*"

The defendant called Mr. *Seth Sweetser* as a witness, who testified that he was the insurance broker on this occasion; that

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[* 338] the said *Joseph Hoyt, Jun.*, applied in behalf * of his father, the plaintiff, to get insurance for 10,000 dollars on the said ship and freight, *viz.*, 7000 dollars on the ship, and the residue on the freight from *Falmouth*, in *England*, to any port in *Europe*; that the said *Sweetser* inquired if the said *Joseph, Jun.*, knew to what port the ship was bound; that he said he did not, but added that perhaps the ship might go to the south of *Europe*, to *Spain* or *Portugal*, though he thought that not probable; he thought it more probable that she would go to *Tonningen*; that she was cleared out for *Hamburgh*; that *Sweetser* inquired if any letter or information had been received from the ship; that the said *Joseph, Jun.*, said he knew of none. *Sweetser* was positive that he made this last inquiry, and received the said answer; that the said *Joseph, Jun.*, did not leave written, but only verbal proposals.

The plaintiff called the said *Joseph Hoyt, Jun.*, as a witness, who testified that he applied to the said *Sweetser*, to get insurance for his father, as stated by *Sweetser*; that the plaintiff had ordered him to get 15,000 dollars insured, if to be had for about 15 per cent., but told him not to get more than 10,000 dollars insured, unless it could be effected at less than 20 per cent.; that *Sweetser* supposed that a policy might be effected at 20 per cent., and engaged to make application to the underwriters; that the said *Joseph, Jun.*, went home and informed his father of the result of his application to Mr. *Sweetser*; and that he presented written proposals to *Sweetser* at the time he applied for the insurance, but was not certain that he left them. He was very positive that he never did inform *Sweetser* that perhaps the ship might go to the south of *Europe*, &c., and he had no recollection of *Sweetser's* enquiring if any information or letter had been received from the ship; but he thought it probable that *Sweetser* inquired where the ship was bound, and that he answered, that she cleared out for *Hamburgh*.

Whereupon the judge directed a nonsuit; to which direction the plaintiff filed exceptions, and the action stood continued to this term upon the said exceptions.

[* 339] *And now, *Putnam* and *White*, of counsel for the plaintiff, moved that the nonsuit be set aside, and a new trial granted, contending that it was the proper province of the jury to have settled the facts, about which there was contradictory evidence at the trial. To them also it belonged to consider and determine whether the letter, which was voluntarily produced by the plaintiff, was material to the issue; and if they should find it so, it was still for them to decide; and this was a question very inter-

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esting to the plaintiff, whether the neglect to exhibit it to the broker, was fraudulent on the part of the plaintiff.

The first point was too well established to need argument. As to the letter itself, it contained information of the political rumors of the day, which, in point of fact, turned out to be false; but if true, as they were of a public nature, the underwriters were as well bound to know them as the assured. (1) The presumption was, that the master of the ship would hear the reports, and that he would thus be deterred from entering the River *Jade;* and so it was not material to show the letter on that account. But whether the concealment was or was not material, the question whether it was fraudulent or not ought still to be referred to the jury, that if they should be satisfied that there was no fraud, the plaintiff may at least recover his premium under the second count in his declaration. The intention of the party is what must in all cases constitute fraud, and that is certainly proper for the jury to decide upon. (2) It ought to operate strongly in the minds of a jury, in this case, that the plaintiff's property at risk was 26,000 dollars, yet that he insured but 10,000 dollars. If he was fraudulent, he must have been stupidly insensible to the care of his own interests

Livermore, for the defendant, was stopped by the Court.

Per Curiam. Whether fraud be a question for the Court or jury, yet if, upon the facts in evidence in this case, the jury had given the plaintiff his premium, we should not have hesitated to set aside the verdict. The letter, which * the plaintiff [* 340] concealed, contained information very material in estimating the risk. The plaintiff must have been aware of this, if he had capacity to enter into a contract. The underwriter had a right to the information. The withholding it from him must be considered fraudulent, and the insurance was therefore void. And being avoided for such a cause, the plaintiff is not entitled to a return of his premium. *The nonsuit is confirmed.*

(1) 3 *Burr.* 1910, *Carter* vs. *Boehm.*
(2) *Doug.* 13, *in notis.* See, also, 1 *New. Rep.* 152.

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JOHN APPLETON *versus* GEORGE CROWNINSHIELD.

Money was lent on a bottomry bond, with condition to be void on payment of the sum borrowed, with the stipulated marine interest, within twenty days after the arrival of the vessel at her port of discharge in this commonwealth; or if she should be lost through the perils of the seas, or by fire, or by the enemies of the *United States*, while performing the intended voyage. The vessel was captured by the British on her return voyage, and condemned in the Vice-Admiralty Court as prize. On an appeal the decree of condemnation was reversed, and restoration ordered. And afterwards the commissioners, under the treaty of 1794, awarded to the owner the value of his vessel and freight, with interest. In an action of *assumpsit* for money had and received by the lender against the owner, it was held that he was entitled to recover the sum lent and the interest thereof received by the owner under the award of the commissioners.

IN this action, which was *assumpsit* for money had and received to the use of the plaintiff, the parties agreed to the following statement of facts, on which judgment was to be rendered, *viz.*: — That on the 25th of November, 1793, the defendant was owner of the schooner *Charming Sally*, whereof *Richard Crowninshield* was master, then lying in the harbor of *Salem*, and bound on a voyage to the *West Indies*; and that the defendant then and there borrowed and received of the plaintiff one hundred and fifty pounds on bottomry, upon the bottom of the said schooner, and executed and delivered to the plaintiff the defendant's bond in the penal sum of three hundred pounds, with a condition thereto in these words, *viz.*: —

"The condition of this obligation is such, that whereas the above-bounden *George Crowninshield* hath borrowed and received of the above-named *John Appleton* one hundred and fifty pounds on bottomry, being on the bottom of the schooner *Charming Sally*, whereof *Richard Crowninshield* is at present master, and now bound on a voyage from hence to one or more islands in the *West Indies*, and from thence to any port or ports whatsoever, and from thence back to *Salem*, or port of discharge in this commonwealth; which sum of money is at the risk of said *John*, but for
[* 341] the proper account and use of the * said *George*, — if, therefore, the said schooner shall perform the said intended voyage or voyages, and the said *George*, his heirs, executors, or administrators, shall and do well and truly pay or cause to be paid unto the said *John*, his lawful attorney, his heirs, executors, administrators, or assigns, the full sum of one hundred and fifty pounds, lawful money of the commonwealth of *Massachusetts*, together with three per cent. per month for interest and adventure from the date

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hereof until the bond is discharged, and within twenty days next after said schooner shall arrive at *Salem*, or port of discharge in this commonwealth; or in case said schooner should be lost through the perils of the seas, or by fire, or the enemies of the *United States*, while she is performing the said intended voyage or voyages, then this obligation shall be void and of no effect; but otherwise shall be and remain of full force, strength, and virtue."

And afterwards, on the 1st day of December, in the same year, the said schooner sailed from *Salem* aforesaid, with a cargo of merchandise on board, belonging to the defendant, upon the voyage described in said condition to said bond, and the said schooner arrived in safety, and without deviation, at her destined port, *viz.*, in the island of *Guadaloupe*, and there the said cargo was delivered, received, and disposed of, and with the proceeds thereof a return cargo was purchased and laden on board of said schooner, and therewith said schooner afterwards sailed for said *Salem*, and in prosecution of said voyage, being the voyage described in said condition, the said schooner, with her said cargo, was captured by certain subjects of the king of *Great Britain*, acting under his authority, and carried to the island of *St. Christopher's*, and in the Vice-Admiralty Court there was condemned as lawful prize, against the will and without the default of the defendant; so that the said schooner never returned to *Salem* aforesaid, nor to her port of discharge in this commonwealth, nor hath said schooner at any time since said condemnation specifically come to * the hands [* 342] or possession of the defendant, or to his use. An appeal was interposed by the defendant from the said sentence of said Vice-Admiralty Court to the lords commissioners of appeals in prize causes in *England*, who reversed said sentence of condemnation of said vessel and cargo, and decreed and ordered a restitution of said schooner to the defendant, and that afterwards the commissioners, appointed pursuant to the seventh article of the treaty of amity, commerce, and navigation between his Britannic majesty and the United States of *America*, did award to the defendant the sum of two thousand dollars, as compensation for said schooner, and five hundred and sixty dollars for the freight thereof; which sums, it is agreed, were full compensation for said schooner and the freight thereof for said voyage, and also lawful interest for the same sums; and afterwards the defendant received the aforesaid sums of two thousand dollars and five hundred and sixty dollars of the *British* government, and interest thereon, from the said condemnation of the said schooner and cargo to the payment of the same respectively by the *British* government: afterwards the plaintiff demanded of the defendant the money loaned to him as aforesaid, with the

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interest thereof, and the defendant refused to pay the same. It is further agreed that an action was commenced on the said bond by the plaintiff against the defendant, upon which action judgment was rendered in the defendant's favor, and a copy of the record in that action is to be considered as in the case.†

Upon these facts the cause was argued by *Dexter* and *Prescott* for the plaintiff, and *Story* for the defendant, partly at the last November term in this county, and partly at the last March term in *Suffolk*.

Prescott. In support of this action the plaintiff contends,

1. That the contract in this case is a contract of bottomry, by which the vessel was pledged; and although
[* 343] *the personal remedy on the bond is lost, yet the plaintiff has a right to follow the proceeds of the pledge into the defendant's hands.

2. That if the lender on a bottomry contract is not entitled to salvage, the defendant has received a sum of money, equal to that which the plaintiff demands in this action, which he is not, in equity and good conscience, entitled to retain from the plaintiff.

In support of the first proposition, it is contended, 1. That by the general marine law, a bottomry bond executed by the owner creates a *lien*, or gives to the lender a remedy against the vessel; or, in other words, that the vessel is, by such a contract, pledged to the lender. This is expressly laid down by *Pothier*, (1) by *Emerigon*, (2) and by *Valin*. (3) Nor is there any difference, whether the bond is executed in the port where the owner lives, or another. — 2. That by the general marine law, the lender on bottomry is liable to general average, and entitled to the benefit of salvage. In the old treatise called *Le Guidon*, (4) it is expressly said that money lent on bottomry shall contribute to general average. By the 17th article of the French *Ordonnance De La Marine*, (5) it is declared, that in case of shipwreck, contracts *a la grosse* shall be reduced to the value of the effects saved; and by the 16th article of the same ordinance it is provided that the lender shall contribute to gross average, &c.; and this is said by the commentator to have been borrowed from *Le Guidon*. *Emerigon* says, that by the *sinistre majeur*, the action personal is extinguished, and there remains to the lender only the action real against the effects saved; (6) and that he is vested with a right to those effects from the moment the

† See the report of the action referred to, *ante*, vol. iii. page 443.
(1) *Traite Du Contr. Du Pret a la Grosse Avanture, Art.* 11, § 2.
(2) *Traite Des Cont. Ala. Grosse, c.* 11. § 2.
(3) *Ord. de la Marine, Liv.* 3, *Tit* 5, *Art.* 2.
(4) *Chap.* 19, *Art.* 5. (5) 2 *Valin* 20. (6) *Emerig. ubi supra.*

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accident happens. *Bynkershoek* declares that whatever is saved, when the ship is wrecked, and does not reach her destined port, remains pledged, &c. By the law of *Denmark* lenders on bottomry are bound to contribute to average losses, according to the amount of their interest. (7) These authorities show the general maritime law of *Europe* on this * point; and the princi- [* 344] ples of that law must govern contracts of this species, except in cases where they may be restrained by municipal laws. — 3. The marine law is so far adopted in the construction of this contract, that a loan on bottomry, made to the owner in the place where he lives, creates a lien on, or gives a remedy against, the vessel; and the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the money lent. (8) Bottomry is defined by Dr. *Brown* (9) to be a contract by the owner at home, binding by his own words both ship and person. Thus, where a part owner, for the purchase of part of a vessel, and for other purposes, executed a bottomry bond on the vessel, the Court of Admiralty in *Ireland* held that she was hypothecated, and that the form was not material. (10) In the case of *Wilmer* vs. *The Smilax*, (11) it was holden by Judge *Winchester*, that the vessel was pledged by a bottomry bond, and he sustained jurisdiction.

The question, whether the lender on a contract of bottomry is liable to general average, and entitled to salvage, has never yet been regularly before the courts in *England*. It must be acknowledged, indeed, that Lord *Mansfield* once said, (12) that by the law of *England*, upon a bottomry contract there is neither average nor salvage; and the same opinion, as far as it relates to average, was adopted by Lord *Kenyon* at nisi prius. (13) But *Marshall*, who reports these *dicta*, says that he has anxiously sought in vain to find any decided case, or authority in the law, which could warrant the doctrine. And he says expressly that by the general law of merchants, the lender on bottomry is entitled to salvage; observing that, without the benefit of salvage, a bottomry contract must partake greatly of the nature of a wager. *Park*, in discussing the same points, yields to the authority of the two judges before mentioned; but he at the same time states that the law has always been otherwise upon the continent of *Europe*.

* 2. But should it be the opinion of the Court, not- [* 345] withstanding the authorities cited, that a lender on bottomry is not entitled to salvage, yet the plaintiff in this action is in equity and good conscience entitled to recover of the defendant the

(7) *Marshall*, 660. (8) 2 *Black. Comm.* 457. (9) 2 *Brown's Civil Law*, 196.
(10) *Ibid.* 530. (11) 2 *Peter's Adm. Decisions*, 295.
(12) *Joyce* vs. *Williamson*, *Marsh.* 653. (13) *Marsh.* 660, *Walpole* vs. *Ewer.*

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money he has received under the award of the commissioners upon the case of the *Charming Sally*.

This is one of that class of cases, where the remedy on the original contract being lost and extinguished by a *vis major*, an implied contract is raised by subsequent events. Thus, in contracts for carrying goods or persons, if the vessel be wrecked or captured, and the owner receives his goods, the carrier may waive his special contract, and recover a *pro ratâ* compensation in an action upon an implied *assumpsit*. This position was admitted by the whole court of King's Bench, in the case of *Mulloy* vs. *Bacher*, (14) where there was a special agreement to carry passengers from *Demerara* to *Flushing*; the vessel being captured and carried into *England*, where the passengers were set at liberty, and their luggage was restored to them. The same doctrine was recognized by the Supreme Court of *New York* in the case of *Post & Al.* vs. *Robertson*, (15) excepting Judge *Livingston*; and this was where there was a charter party, the plaintiffs becoming nonsuit, because they had misconceived the form of their action. Sir *William Scott* also recognizes the principle in the case of *The Copenhagen*, (16) which was a vessel bound from *Smyrna* to *Copenhagen*, put into a British port in distress, and was afterwards detained, and a *pro ratâ* freight was decreed. So in the case of *Curling* vs. *Long*. (17) — In the case of *Baillie* vs. *Moudigliani*, (18) a vessel bound from *Nevis* to *Bristol* was captured, carried into *France*, and there condemned. Upon an appeal the sentence of condemnation was reversed, and the proceeds of the cargo, which had been sold, was paid to the owners. The court held them accountable for freight of the cargo *pro ratâ*. In this case the contract had been dissolved; [* 346] but upon the restoration of the * property an implied promise was raised to pay so much freight as had been earned.

The particular circumstances of this case put the plaintiff on higher ground than in an ordinary case of salvage. Here was not a capture in war. The government of *Great Britain*, under whose authority the seizure took place, has acknowledged the taking unjustifiable; the claim for indemnity has been settled by commissioners, *quasi* arbitrators, and a full compensation has been awarded to the defendant, for the loss of the whole enterprise, including his vessel and freight; and it has been received by him. A portion of it belongs to the plaintiff upon every principle of law and equity; and this is the proper action, by which he should recover it.

(14) 5 *East*, 316.
(15) 1 *Johns. Rep.* 24.
(16) 1 *Rob. Adm. Rep.* 289.
(17) 1 *Bos. & Pul.* 634.
(18) *Park*, 53.

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Story was aware of the difficulty of arguing the cause, after the merits of it had been in some degree anticipated in the former action between the same parties upon the same bond. But notwithstanding the strong intimations of the court in that case, as to the general principles, and the pointed language of one of the judges as to the dishonesty of the defence, he observed that as his client and himself still believed the defence honorable as well as legal, he hoped to be excused, if his argument should be extended to an unusual length. And that length must be the reporter's apology for the very abridged statement he gives of the argument; observing that *Story* read and applied the greater part of the numerous authorities, which he cited in support of the several points made by him.

It was contended by him, that if this action was maintainable at all, it must be upon one of the following grounds: —

1. Upon the principles of the common law;

2. Upon the principles of the marine law; or,

3. Upon certain equitable principles, which in cases of this nature are extended to legal remedies, in modern times.

1. Upon the common law; and this must be on one or other of the following grounds, *viz.*: —

* 1. That the condition of the obligation has been [* **347**] fulfilled, and the event has taken place, upon which the payment was to be made. — But this is expressly negatived in the decision of the former action upon the bond.

2. Upon the doctrine of *cy pres*, or that the condition has been performed as near as it could be, and therefore substantially. — To this the same answer may be given.

3. Or upon the doctrine of *apportionment*. — This admits of several answers. 1. If the doctrine were true, and applied to the case, the apportionment should have been made in the original action on the bond, and the judgment in that action is now a bar. (19) — 2. The law allows no apportionment in the present case. A contract, with or without seal, cannot be apportioned. (20) In addition to the ancient authorities cited to this point, which, however, it will appear, have been adhered to by the wisest and ablest modern judges, although the rule has been sometimes lost sight of, the case of *Cutter* vs. *Powell* (21) has a strong bearing on the position.

(19) 1 *Roll Rep.* 368. — 3 *Rep.* 24, *a.* — *Brownl.* 33. — *Vin. Abr. Apportionment, E.* 2. — *Coke on Magna Charta*, 503. — 1 *Vent.* 276. — *Cro. Eliz.* 771. — *Com. Dig. Suspension, E.*

(20) *Bro. Contract, pl.* 30, 31. *Apportionment, pl.* 1, 7, 26, 17. *Laborers, pl.* 48 — 3 *Mod.* 153. — *Salk.* 65, *S. C.* — *Moore*, 116, *pl.* 260. — *Cro. Eliz.* 351. — *Finch's L. lib.* 2, *c.* 13. — *Carth.* 466. — 1 *L. Raym.* 360. — *Perkins*, § 824, 825, 828.

(21) 6 *D. & E.* 310.

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It is true in the present case the plaintiff goes for his full compensation; but the principle, if true, must bear through all the varieties of the case, from a full compensation to the smallest salvage. This is a contract at common law, and the party cannot recover on such a contract, but upon the fulfilment of all the conditions on his part.

2. Upon the marine law, the plaintiff cannot recover, unless he shows that that law, as adopted in this country, is decisively in his favor, and that this is a contract of a universal nature, to be governed *solely and exclusively* by that law. For unless this be shown, the parties might contract upon different principles, and the contract must be governed only by its own stipulations. Thus it is clear that by the terms of this contract, payment was to be made only in one event, *viz.*, the safe performance of the voyage, and the arrival of the vessel at *Salem*. The parties had a right so to contract, and the law must enforce the contract as it was made.

[* 348] * Further, this is not a contract of a universal nature, or governed by any general law, but by the mere stipulations of the parties; (22) and although known among various nations, their regulations respecting it vary in forms and principles. — Thus by the *Roman* law, it was essential to the contract of bottomry, that the money should be employed in merchandise, *to be laden in the ship at the risk of the lender*. (23) — At *Leghorn* and other places in *Italy*, it is permitted to lend money on bottomry *in form of a wager;* and the contract binds, although the borrower puts nothing at risk in the designated ship. (24) — In *France*, this is prohibited, and it is of the essence of the contract that the money should be employed in some object involving a sea risk. (25) — In *England*, a bottomry bond *on the voyage* merely would be good, having been prohibited by statute only in cases of *East India* voyages. (26) — In *Spain* the same rule exists. (27) — In *France*, money may not be borrowed at respondentia on *freight*, nor on profits. (28) In *England*, it may be borrowed on freight; (29) while by the canon and papal law maritime loans are altogether prohibited. (30)

[Many more instances of the variance of this species of contract in different commercial nations were cited; from whence it was inferred that the contract is not of a universal nature, or governed by universal law; that no implied agreements are to be added; and

(22) 4 *East*, 323, *Busk* vs. *Feason*.
(23) *Dig. lib.* 22, *tit.* 2, § 1.
(24) *Casaregis Disc.* 14, 15.
(25) 2 *Emerig.* 492. — *Ord. Art.* 14, *h. t.*
(26) 2 *Black. Comm.* 458. — *Park*, 411. — *Abbott*, 164. — *Marshall*, 640.
(27) 2 *Magens*, 56, 59.
(28) 2 *Emerig.* 480. — *Marsh.* 644.
(29) 4 *Rob. Adm Rep.* 245. — 2 *Brown's Adm.* 198. — *Abbott*, 159.
(30) *Santerna.* l. 1 § 26. — *Straccha*, 798.

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that it is to be construed, like other contracts, by what the parties have done and said.]

As the plaintiff relies on the principle, that a lender on bottomry has a lien on the effects saved, and their proceeds, and that salvage properly belongs to the contract, it will appear on a further examination of the foreign jurists and the *English* decisions, that there is no such universal or general principle. The ordinance of *Louis* the Fourteenth, with the commentaries of *Valin*, *Emerigon*, and *Pothier*, have been cited to support the plaintiff's claim on this ground. But an examination of the articles on this subject * will show clearly that those commentators speak [* 349] only in the language of positive law, or the deductions flowing from the ordinance itself. Among the principal points maintained by them, none seems more clear than that general average is of the essence of this contract. Yet this position forms no part of the marine law of several other enlightened and commercial nations. — The ordinance of *Hamburgh*, (31) expressly provides that the lender on bottomry is free from all averages, and not liable to contribute thereto. The ordinance of *Amsterdam*, 1744, provides that the lender shall not be liable to gross average. (32)

We contend, that by the law of *England*, there is neither average nor salvage. It is true that *Marshall* says, he can find no authority to the point, and he, therefore, states it doubtingly. But *Park* lays down the doctrine as settled, and considers the statute of 19 *Geo.* 2. *c.* 37, § 5, as introductive of new law. *Blackstone*, (33) *Christian*, (34) *Abbott*, (35) and *Fonblanque*, (36) view the statute in the same light. That there are no very recent decisions on this question must arise from the infrequency of the contract at present in *England*.

But two decisions directly in point have been made by two eminent judges, who together illuminated the bench of justice for more than half a century. In *Joyce* vs. *Williamson* the doctrine was fully avowed by Lord *Mansfield*. "*It is clear*," says he, "that by the law of *England*, upon a bottomry contract there is neither average nor salvage. Either way there must be a hardship, but the law allows no average or salvage on bottomry bonds." This case was on a bottomry bond upon special pleadings, and if there had been any general average by the English law, the judgment was not rightly given; for the defendant would have been entitled to a deduction in that action, it being in the nature of a part payment, or at least a lien upon the bond. In *Walpole* vs. *Ewer*, which

(31) 2 *Magens*, 225. (32) *Ibid.* 136. — 1 *Magens*, 19, 20. (33) 2 *Comm.* 455
(34) 2 *Comm.* 455, *note*. (35) *Abbott*, 164. (36) 1 *Fonb.* 252

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arose on a respondentia bond, on which general aver-
[* 350] age was claimed, Lord *Kenyon* said, * " By the law of *England*, a lender on bottomry is not liable to average losses." — In both the cases the question was directly before the court, and those eminent judges spoke without doubt or hesitation. Nor has the doctrine been since questioned. We may thence fairly conclude that the profession have generally acquiesced in it In *America* no case has been litigated to ascertain the point.

There can then be no ground of *English* law, on which the plaintiff can entitle himself; and he must sustain his action by the positive rules of the *French* code, which may be perfectly equitable in itself, but in its distribution of justice cannot be followed through out in a common law court of another country. But the *Roman* law, which is the highest source on this subject, speaks decisively in favor of the defendant. (37) By the language of the civil law, the obligation is extinguished forever; and it is only by the municipal regulations of *France* that it is revived. On this head the very sensible observations of Judge *Livingston*, in giving his opinion in *Post* vs. *Robertson*, have great application and force.

In the great case of *Lucina* vs. *Crawford*, (38) the court " held, that there might be an insurable interest, without power to abandon, as in the case of freight, *bottomry* and *respondentia*," which plainly shows that no salvage exists on a bottomry contract; else an abandonment might, in a policy on it, unquestionably be required, as in other cases.

3. But the plaintiff rests his action upon the ground, that we have received money, which *ex equo et bono* we ought not to retain; or that the receipt of the money, under the award of the commissioners, constitutes a new consideration, which springs up, although the orignal obligation is extinguished, to enforce his claim upon an implied promise.

But there can be no want of conscience in withholding money,
which by the contract of the parties is not due.
[* 351] *Until an agreement to this effect appears, the withholding the money, so far from indicating a want of regard to mercantile honor, rests on the fair basis of an honorable compact.

The whole of this doctrine of a right to recover, where a contract has not been complied with, rests on the modern case of *Luke* vs. *Lyde*, (39) the decision of which is extremely questionable, and rides over all the ancient and settled doctrine. The case was

(37) *Dig. lib.* 22, *tit.* 2, *sec.* 3. — *Hall's Law Journal*, 153.
(38) 5 *Bos. & Pul.* 310. (39) 2 *Burr.* 882.

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never much relished in *England;* and it was certainly an unjust decision, for the owner derived no benefit from it. So it was considered by this Court in *Coffin* vs. *Storer.* (40) It evidently did not meet the approbation of Lord *Kenyon* in *Cook* vs. *Jennings,* (41) and was reluctantly admitted by Lord *Ellenborough* in *Mulloy* vs. *Bacher,* (42) where he stated that the case, if supported at all, stood on the *marine law,* and was *contrary to the law of* England. In *Liddard* vs. *Lopes,* (43) Lord *Ellenborough* said, "The case of *Luke* vs. *Lyde* has been often pressed beyond its fair bearing; but the true sense of it has been expressed by my brother *Lawrence* in *Cook* vs. *Jennings,* and by my brother *Le Blanc* in *Mulloy* vs. *Bacher.* The parties have entered into a special contract, by which freight is made payable in one event only, that of a right delivery of the cargo, according to the terms of the contract, and that has not taken place; there has been no delivery, and consequently the plaintiff is not entitled to recover. He should have provided for the emergency which has arisen."

This decision restored the old law, and the same principle, that even in marine contracts the parties shall be bound by their own stipulations, and not otherwise, has been rigidly adhered to in a great variety of cases. Among them may be mentioned *Bright* vs. *Cowper,* (44) cited and approved in *Cook* vs. *Jennings,* and by *Abbott;* (45) *Cutter* vs. *Powell.* (46) The case of *Cook* vs. *Jennings* is often quoted, and never with disapprobation. No action was * ever brought to try the question in *assumpsit.* [* **352**] Other cases to the same effect are *Smith* vs. *Wilson,* (47) *Atty* vs. *Lindo,* (48) *The Hiram,* (49) and *Scott* vs. *Libbey.* (50) Yet if the French ordinance and the language of its commentators be the marine law, these cases would have received a different decision. See also the cases of *Hunter* vs. *Princeps,* (51) and *Appleby* vs. *Dods.* (52)

In the case of *Dandy* vs. *Turner* (53) a part owner borrowed money at bottomry, payable *on the return of the ship from the voyage she was then going on,* in the service of the *East India* company; and the company broke up the ship in the *East Indies.* The owner recovered damages of the company, though not in full satisfaction. The lender on bottomry brought his bill to recover proportionable payment out of the money recovered; but it was dismissed.

The case of *Ingledon* vs. *Foster* (54) forms the converse of the

(40) 5 *Mass. Rep.* 252.
(41) 7 *D. & E.* 381.
(42) 5 *East,* 316.
(43) 10 *East,* 526.
(44) 1 *Brownl.* 21.
(45) *Page* 313.
(46) 6 *D. & E.* 323.
(47) 8 *East,* 437.
(48) 1 *New Rep.* 236.
(49) 3 *Rob. Adm. Rep.* 186
(50) 3 *Johns. Rep.* 336.
(51) 10 *East,* 378.
(52) 8 *East,* 300.
(53) 1 *Abr. Eq. Ca.* 372.
(54) 4 *Vin. Abr.* 281, *cites Marshall,* 751

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case at bar, and shows that if the condition stipulated by the parties is not exactly performed, no relief shall be given to either, whatever may be the equity of the case in other respects.

Nor does the fact, that the owner has received a full compensation for his loss, vary the principle, even in maritime contracts. Thus no wages are due to seamen, when the freight is lost, although the owner recover of his underwriters a full compensation. (55)

The defendant in the case at bar contracted to repay the money upon the vessel's safe arrival at *Salem* from her voyage. The plaintiff agreed to lose, if the ship was lost during the voyage by the perils stated, and did not arrive at *Salem*. The ship was lost; she never arrived at *Salem;* she was captured and condemned, and was never restored to the plaintiff. Upon what principles of justice can the plaintiff complain? In a fortunate event he was to receive his money and exorbitant interest, vastly beyond the rate of insurance, whether the defendant made a profit or not, or whether he was ruined or not by the stipulation. On the other hand, [* **353**] though the vessel had been * wrecked, and afterwards repaired at an expense nearly equal to her value, and had performed her voyage, the plaintiff would have been entitled to his money and his maritime interest without any deduction. As there has been an express contract in the case, the law cannot imply a different one; the receipt of the money constitutes no consideration to raise a promise; nothing is due to the plaintiff *ex aequo et bono;* the defendant has a right to say, *Non in hæc fœdera veni.*

But it is said the plaintiff is entitled to recover upon the special circumstances of this case; that the compensation was made by the commissioners to all persons injured; and that the defendant has in fact received the sum, which in justice he is bound to pay over to the plaintiff.

The facts, however, show nothing like this. The compensation was the value of the vessel and the freight only. It could be nothing more under the provisions of the treaty. The commissioners did nothing more than execute the decree of reversal. They had no authority beyond this. They could not consider and award on an incidental claim, as a bottomry or insurance interest. Nor was any such claim made. It would have been equally novel and absurd. This bottomry bond was not captured or condemned; and for captures and condemnations only could the commissioners award damages. But if it were otherwise, the plaintiff should have claimed it. Having neglected to do so, he cannot claim from the defendant money lost by his own neglect.

(55) *McQuirk* vs. *Ship Penelope*, 2 *Peter's Adm. Rep.* 276. — *Goodrich* vs. *Peabody*, *cited in Abbott*, 423, *Amer. edit.* 1810.

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But in truth the hardship to the defendant would be extreme, since the plaintiff would be in as good a situation as if he had never hazarded the money; while the defendant would suffer the whole loss of property, to the amount of the bond, would stand the insurer of the lender, pay interest (and according to the terms of the contract 36 per cent.) on a principal sum, which he was not to pay, but on a fortunate termination of the voyage; and yet neither interest, * nor principal, nor premium have [* 354] been allowed him by the commissioners.

The whole question in this case has once been before the Court upon all the facts. The action was not sustained; it has passed *in rem judicatam.* If the plaintiff was entitled to recover upon the marine law, it seems very clear that he was entitled to judgment in the former action; because, if it was a contract governed by that law, it must have had implied in its terms all the conditions and stipulations of that law. It was precisely the same, as if the condition had stated expressly what that law implied. And if so, no doubt could arise, that if the stipulations had been expressed, the replication was good for the proportion, to which the plaintiff was entitled. Being once barred, then, the plaintiff is not now entitled to recover. He cannot resort to *assumpsit*, when he had a sealed instrument for his debt. If a bar be once good, even though founded on a statute that has since expired, it will avail forever, if judgment passed while it was in force. (56)

Upon principles of the common law, or of the marine law, or of equity, or the special circumstances of the case, it is humbly conceived and insisted that the plaintiff has no claim to recover on the ground of the award of restitution to the defendant.

Dexter, in reply. The defendant's counsel would argue, that because decisions relative to the subject before the Court are in collision with each other, there is therefore no law merchant by which this case can be decided. The same reasoning would go to prove that there exists no such thing as a law of nations, or of admiralty; and perhaps more strongly yet, that we have no common law. But because writers or judges may at different times, or in different countries, have advocated contradictory opinions on any particular point, it does by no means follow, that there are no established principles of law on such subject.

The species of contract, which has given rise to the present action, being most frequently entered into between * citizens of different countries, it becomes necessary for [* 355] the construing and enforcing it, that there should be some

(56) 12 *Mod.* 400, *Faulkland* vs. *Stanion.*

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general commercial law, recognized by all commercial nations. Perhaps such a forum is not so necessary to any other contract known among merchants. With this view all maritime nations have established courts of admiralty, who are exclusively governed by such general law, for the purpose of administering justice between citizens of different nations.

We have referred to books of the highest authority in this law, declaring that the lender on bottomry is liable to general, though not to particular average, that he is entitled to salvage, and that he has a lien on the thing pledged, and its proceeds, wherever they may be.

Nor can it be said that on this point the law of *England* is at variance with that of the rest of *Europe*. The mere extrajudicial observation of Lord *Mansfield* will not determine the law of *England* But the real import of the observation alluded to was no more than that there was no case, in which the principle, which he denied, had been adjudged. And on the other hand, *Marshall*, a very able and laborious compiler, declares he can find no authority for his lordship's position; and plainly expresses his doubts of it as law, though Lord *Kenyon* had adopted it, from respect to his predecessor.

In the case of *Luke* vs. *Lyde* Lord *Mansfield* adopts the general law, and quotes the foreign jurists with great respect, considering their opinions as controling the maxims of the common or municipal law of *England*, as applicable to the subject of freight. If such were his opinions at that time, — and they were unquestionably correct, — the same general law, which he applied to the contract respecting freight was equally applicable to the contract of bottomry. Salvage attaches as well to one as to the other subject by that law; and the *dictum* afterwards dropped by his lordship in the case of *Joyce* vs. *Williamson* is plainly inconsistent with the solemn opinion delivered by him in the case of *Luke* vs. *Lyde*.

[* 356] * Much reliance has been placed on the old common law relating to the apportionment of an entire contract, and great research into the ancient authorities has been shown. But the doctrine does not apply to the plaintiff's demand in this action. He does not claim a part of what would have been regularly due to him upon the bottomry bond, if the voyage had had a successful termination. The Court have already determined that contract not to be a subsisting one. The regular remedy, by which he now seeks his right, is the equitable action for money had and received. The defendant has received the value of his vessel and freight, including the money lent him by the plaintiff. It is against

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conscience for him to retain it; and if the plaintiff has any remedy, it is by this form of action.

We cannot, since the former decision, maintain that the vessel was not lost by one of those risks, on which the plaintiff placed his loan. But if the loss was within the contract, and by subsequent events compensation for it has been received by the defendant, although we cannot recover on the contract, we may yet be entitled to recover in an equitable action.

But we contend more strongly that the plaintiff is entitled under the treaty. The money received by the defendant was virtually awarded to the plaintiff, so far as his share of the concern extended, and was paid to the defendant in trust for him. The plaintiff had a lien, as mortgagee, upon the vessel, and upon the proceeds of it, when they came into the hands of the defendant. Those proceeds were in part a compensation for the loss of the subject, which constituted the plaintiff's security. To the most superficial observation it is plainly against equity and all good conscience for the defendant to retain this money from the plaintiff.

At this term the judges delivered their opinions, *seriatim*, to the following effect: —

PARKER, J. In this case the principal facts are, that the plaintiff in 1793 loaned to the defendant five hundred
*dollars on a bottomry contract, on which he was to [* 357]
receive the principal, with three per cent. per month for
marine interest, on the return of the vessel to *Salem*, from the voyage which he had undertaken; and in case of a loss of the vessel by perils of the seas, or by fire, or the enemies of the *United States*, the contract was to be void. — The vessel arrived at the Island of *Guadaloupe*, discharged her cargo, took a return cargo, set sail for *Salem*, and was captured by a British ship of war, carried into *St. Christophers*, and there libelled and condemned. On an appeal to the lords commissioners of the admiralty, the decree of condemnation was reversed, and a restoration ordered; but the vessel had perished, or been converted to the use of the captors, so that a restoration could not be had. But under the treaty of 1794 full compensation for the vessel and freight, together with interest from the capture, was awarded by the commissioners under that treaty, and the amount thereof has been received by the defendant

An action has since been brought upon the contract, but all these facts appearing on the pleadings, the plaintiff failed to recover, because the event, upon which the money was to be paid, had not occurred; and the Court felt themselves bound by the rules of law to decide that the subsequent indemnification of the defendant could not give effect to a contract which had been defeated by

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events, which appeared to be within the stipulations of the parties. That decision was founded upon a necessary adherence to technical rules, and not upon any apprehension that the defence set up to the bond was really meritorious.

An action for money had and received is now brought to recover the proportion, supposed to be due to the plaintiff upon equitable principles, of the money received by the defendant under the award of the commissioners; and the question is, whether any part of that sum ought *ex æquo et bono* to be paid over to the plaintiff.

Until I heard the very elaborate and learned argument by the defendant's counsel against the action, I did not [* 358] * entertain a doubt upon this question. It appeared so clear that a part of the money received by the defendant was a compensation for the five hundred dollars, for which his vessel was pledged to the plaintiff, that I had no suspicion he would await a suit at law before he paid the money.

After a careful review of that argument, I remain of the same opinion; although I confess that some of the points, on which I formerly placed it, have been shaken. I do not know but it is proved by the argument, that the doctrine of average and salvage, as applicable to bottomry contracts, instead of being the general maritime law, is the law of particular commercial countries; but on this point I give no decided opinion, because the present case does not require it.

Neither should I like to attempt a refutation of the argument against the apportionment of contracts. This might be a difficult task, and may be avoided in discussing the case before us. That a party, having a meritorious claim on another, secured by a sealed contract, which he cannot enforce for want of compliance with some stipulation, may nevertheless obtain what is justly due to him in another form of action, is settled by the case of *Luke* vs. *Lyde*, which has never been overruled in *England*, and has been frequently relied on as law in this country. Even in the case of *Cook* vs. *Jennings*, where the party failed to recover upon the charter party, because he had not done what by his contract he had undertaken to do, it is strongly intimated by the court, that he might obtain justice in an action of *assumpsit* upon the implied promise of the freighter to pay for the hire of his vessel *pro ratâ itineris*. It is enough to satisfy the nicety of technical rules, that a party seeking a remedy upon an express contract shall be held to show that he has performed the stipulation, which entitles him to be paid. At the same time it is happy that the law is liberal enough to provide that the man, who voluntarily receives part of a benefit which he had secured by a contract, should be considered as

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* making a new contract to pay for the part which he so [* 359] consents to receive.

But I do not know that it is necessary to establish even this principle, in order to maintain the present action. The broad basis of an action for money had and received is, that one man has actually received money belonging to another, or which, by the rules of common honesty, he ought to pay over to the other. The vessel of the defendant sailed to the *West Indies*, pledged to the plaintiff for the sum of five hundred dollars, and the interest which accrued thereon. At the time of the capture the plaintiff had an interest in the vessel to that amount, and the defendant's interest was less than the whole value by the same amount.

Had the vessel continued alive, and returned to *Salem*, or in any event except an actual loss of the vessel, the defendant would not have been restored to his ownership of the whole, without paying to the plaintiff the sum loaned and interest; because the plaintiff had a lien upon her, irrevocable but by payment of the money. This lien would have followed her into whose hands soever she should have gone with the consent of the defendant; and when the decree of restoration passed, had the vessel been in being, the plaintiff's interest would have continued, and was defeasible only by the payment of the money for which it was pledged; and in such an event I do not see but marine interest would have been recoverable to the time of her actual arrival at *Salem*, her port of discharge.

Under these circumstances, when the two governments provided by treaty that all parties, who had suffered by the unjust captures made by the *British*, should be made whole, whatever was their interest, or in whatever form it existed, can it be doubted that the plaintiff was a suffering party within the meaning of the treaty? — What prevented him from receiving the money upon his bond? Certainly the capture by the *British*. — Who destroyed his pledge for the loan? Certainly the *British*. — It was therefore proper * that he should be indemnified; and the only [* 360] question is, whether they have not intended to indemnify him.

Now, the whole value of the vessel has been paid for, as also her freight, and interest from the capture. This payment has been nominally awarded to the defendant; but it was substantially for the use of the plaintiff, and the former, in receiving it, was the agent of the latter. This principle was determined in the case of *Heard* vs. *Bradford*, (57) in which it was declared by the court, that whoever had a legal interest in the property, the loss of which was

(57) 4 *Mass. Rep.* 396.

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compensated by the award, should be entitled to his proportion, in an action against the person in whose favor the award was nominally made. I consider that case as deciding every important question in this.

Upon the whole, I cannot see any fair principle, upon which a man, who has borrowed money upon the pledge of his vessel, the payment depending upon a contingency, the happening of which is prevented by a third party, who, having destroyed the pledge, afterwards makes complete satisfaction for it in money, besides paying him damages for detention, can refuse to repay the money he so borrowed. I acquit, however, the defendant of any unfair intentions, because the zeal of the argument in favor of the principle, and the labor bestowed on it, shows a settled opinion of his counsel in his favor.

SEWALL, J. The principal question arising in the case agreed by the parties is novel; and, as I apprehend it, the circumstances, upon which the decision depends, are singular and unprecedented.

When the same parties were before this Court, in an action brought by the plaintiff upon the defendant's bond, the facts now appearing in their agreed statement were then set forth and averred in special pleadings, closed by an issue in law. In that action judgment was entered for the defendant by the decision of a majority of the justices now present, who sat in that cause. Their opinion was that the repayment of the loan had been
[* 361] risked upon the * performance of the voyage specified in the defendant's bond, which had been finally defeated by the capture and loss of his vessel, and that this discharge from the loan was conclusive in an action upon the bond.

A supposed right of salvage, implied and to be understood in a bottomry bond, and in a contract for a loan upon a marine risk, was then adverted to, and argued for the plaintiff. But the question, arising in that view of the case, was not determined; it being the opinion of the justices who concurred in the decision, that a demand of salvage, not provided for in the condition of the bond, was not recoverable in an action upon the original contract. And to fortify the decision in this respect, some notice was taken of the course of proceedings in *France*, where a right of salvage is very explicitly secured to the lender of money upon contract *a la grosse avanture*, including contracts of bottomry and *respondentia*. When the loan terminates by a misfortune, which excuses the borrower from a repayment, he is also discharged from any personal liability upon the original contract; and where effects, saved from the loss which determines the risk, have come to his hands, he is liable in another form of action.

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In the case at bar, as it is now presented, the principal circumstance to be considered is the compensation awarded and paid to the defendant for the loss of his vessel and voyage. The plaintiff had a share and concern in the voyage defeated and lost, and sustained an actual loss and damage to the amount of his loan. — Has he any interest or property in the compensation, accruing to him either by the operation of the original contract, as a salvage accrues to an insurer after payment of a loss upon a policy of insurance? or by virtue of the provision in the treaty of *London*, under which the defendant obtained his award?

If the plaintiff is entitled, the present form of action is suitable to the case; for on either ground his interest and property in the sums paid, for the damages sustained by the loss of the vessel and voyage, is money received to his * use, which the [* 362] defendant cannot justly retain. Nor, as I conceive, is the demand now pursued against the defendant, in any sense, an apportionment of the original contract. If maintained against him, it is because money has come to his hands belonging to the plaintiff, by a title, which he derives indeed from the original contract and loan, and the events which determined it. But the defendant's liability in this action does not depend upon the circumstance, that he was a party to the former contract; but he is liable, as any other person would be, who holds money which he is not entitled to retain, and which belongs to the party demanding it.

The plaintiff's demand has been urged upon the ground of a right to salvage, implied in the defendant's bond by a necessary construction, required by mercantile usages applicable to bottomry and *respondentia* bonds, and generally to contracts for loans placed by the lenders upon maritime risks. *Valin* and other foreign jurists have been cited to prove the usages of commercial nations in this respect.

On the other hand, the defendant's counsel has gone into a very extensive examination of the rules established among the European nations, to prove that contracts of this description have no uniform operation, but are the subjects of very various municipal regulations.

But after all, the question, as it arises between these parties, must be determined in this jurisdiction according to the usages which have been adopted with us, or by the stricter principles of the common law. In this view of the case, the *dicta* of Lord *Mansfield*, followed by Lord *Kenyon*, in the decisions which have been cited, and the total failure of judicial decisions in support of the construction insisted on for the plaintiff, are in a degree conclusive against an allowance in the nature of salvage; especially where the contract for the loan contains no pledge of the vessel

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For, according to *Bynkershoek*, who, more than any other foreign jurist, has defined the contract of bottomry, and de-
[* 363] scribed its use and * operation, according to its nature and origin, independent of municipal regulations, it is the pledge of the vessel, or other effects upon which the loan is made, and of what may remain of them after any event, by which the personal responsibility of the borrower is excused, from which the right to salvage is inferred. (58) And for myself, I cannot perceive in the contract in question any pledge of the vessel, upon which the loan was placed, nor is there any usage, that I know of, which requires or justifies a construction to that effect.

Has the plaintiff then any interest, or property, in the compensation awarded and paid to the defendant, under the provisions of the treaty of *London* usually called Mr. *Jay's* treaty?

It is ascertained by the decree of reversal, that not only the condemnation, but the capture, of the defendant's vessel and cargo, had been irregular and illegal. By this reversal and the decree of restoration, the capture, as operating in itself a discharge of the defendant according to the condition of his bond, was annulled. If an actual restoration of the vessel had been practicable, and had been made pursuant to the decree, and her return to *Salem* afterwards had been prevented by the neglect or voluntary act of the defendant, his liability for the loan would have revived and continued upon his bond, according to its legal construction and operation; and the capture alone, thus avoided, would have afforded him no defence against the plaintiff's demand. (59) It may deserve notice, too, that thus far the rights of the parties are determined and preserved by general principles of national and municipal law; the treaty having the operation only, if that was required in any case, of opening or renewing the remedy by appeal. But an actual restoration, in consequence of a decree of reversal, had become impracticable at the time of the treaty, or was supposed so to be; and from various circumstances belonging to the cases intended to be provided for, an adequate compensation was not then to
[* 364] be had, by the * ordinary course of judicial proceedings, for losses and damages sustained. And here the treaty interposes, with an especial and extraordinary redress, and a declared intention to compensate losses and damages sustained by reason of irregular and illegal captures and condemnations, with the exception only of losses by the acts or omissions of the claimants.

For whom, then, was this provision made? To whom was this

(58) *Bynk. Quaest. Pub. lib.* 3, *c.* 16. (59) *Marshall*, 659. *Joyce* vs. *Williamson*.

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redress of injuries, and compensation for losses and damages sustained, appointed? For my part, I can discover no reason for stopping the course of this provision, and preventing it from reaching those who incurred a loss, arising entirely from the inability of the *British* government to effect a restoration of a vessel illegally captured and condemned.

In his necessity for this provision, and for the extensive operation proposed to be given it, the plaintiff's case is distinguishable in some degree from other cases, which have undoubtedly occurred. Take the case of an award to the owner of a vessel illegally captured and condemned, made in his name and paid to him, who before the treaty had received from his insurers, in a policy of insurance upon the same vessel and voyage, the amount of their subscriptions as for a total loss. — According to their concern in the loss compensated, they would be entitled in the sums paid to the insured upon the award, recoverable as money paid to their use.

It may be said, that their title would be, either an express abandonment to them when the loss was adjusted, or that right to salvage, which is implied and understood between the parties to a contract of insurance in the most usual form.

To come nearer, then, to the present case, suppose the insurance to have been against a total loss only, without benefit of salvage. The insurer would in this last case be entitled either to reclaim his payment upon the policy as a payment by mistake, or to recover the compensation according * to his interest in [* 365] it, arising from the loss and damage sustained by the insurer, and not the insured, who to that amount had been previously indemnified.

This Court decided for the plaintiff in the case of *Heard, Assignee of Geyer and Son*, vs. *Bradford*, (60) upon this construction of the provision of the seventh article of the treaty of *London*; and the reasoning of the judge, by whom the opinion was in that case delivered, appears to me to favor the application now proposed, of the provision of the treaty to the benefit of the plaintiff in the case at bar. *Bradford* had received the amount of an award under the treaty for a vessel illegally captured and condemned, and for his freight. The vessel at the time of the capture was on a voyage for which she had been chartered to *Geyer & Son*, and was in their employ. After the capture, they had been induced to pay, and either before the treaty, or before the award, *Bradford* had received from them the hire or freight of the vessel up to the time of the capture, at the rate agreed by the charter party, notwithstanding

(60) 4 *Mass. Rep.* 396.

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the interruption, and although the freight was not payable by the terms of the charter party until the completion of the return voyage. It was thought unnecessary to determine the question made in the argument of the cause, whether the freight, as paid by *Geyer & Son*, was then due and recoverable from them; but as they, by their payment, had actually sustained the loss and damage to the amount of the freight, the award upon that subject was construed to be for their benefit. And it is stated as a general principle, "that the rights of the parties must depend upon their interests; and that whenever an award was made nominally to one, where the interest was in another, that other would be entitled to the benefit intended."

It may be objected, — and this seems to be the ground principally relied on for the defendant, — that the events which defeated his voyage placed in his hands the sum borrowed of the plaintiff, as an indemnity to that amount, justly acquired to himself by the
[* 366] terms of the loan. And this being * conceded and established by the judgment in the former action between these parties, the defendant's counsel would draw from it this further conclusion — that a compensation for his vessel and cargo, after he had been thus acquitted of the charge and risk undertaken for the plaintiff, is not to be considered as a restoration to the plaintiff, or as a provision for his benefit.

In this, as I think, unreasonable and inequitable inference, I cannot acquiesce. The seventh article of the treaty of *London* contains a provision for citizens of the *United States*, who had sustained losses and damages by irregular captures and condemnations. The plaintiff, to the amount of his loan, was one of these; and the defendant, to that amount, is excluded from the description of persons, for whom the provision was made, after an indemnification at the expense of the plaintiff. The plaintiff thereby became a partner in the loss, although not a part owner of the vessel on which the loan was made, or having any lien or pledge to secure the repayment. But the plaintiff's concern in the loss is sufficient to establish an interest, to the same amount, in the compensation afforded by a public treaty, providing generally for all who had sustained losses, and to be regarded as an act of protection by the national government, by means of an advantageous treaty taking the place, as it may be understood, of letters of marque and reprisal. (61)

It is in this view of the case, that I have come to the conclusion, that the plaintiff is entitled to recover. A stipulation to compensate the sufferers for their losses and damages is accepted by the

(61) See 1 *Black. Comm.* 258, 9

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national government, as a satisfaction for British depredations; so the illegal captures mentioned in the treaty, as complained of by the citizens of the *United States*, had been called. An award of compensation, in a case of loss by illegal capture, where the plaintiff was a partner in the loss, including in the estimate of it a sum for which at his expense the defendant had been previously indemnified, although made to the defendant, *and paid to him, must be considered as including the plaintiff's share and concern in the loss compensated, and as directed to his use and benefit, by virtue of the stipulation and public law, under which the award was obtained. [* 367]

It may be necessary that the Court should now concur in some rule of estimating the damages recoverable in this novel and unprecedented case. And for myself, as the defendant confesses the receipt of an adequate compensation, to the full value of the vessel, with her freight or estimated earnings for the voyage, defeated by the illegal capture, I am inclined to think the plaintiff entitled to the full amount of his loss; that is to say, to the sum loaned, and the maritime interest secured by the bond, reckoned to the time of the capture. But that there may be a final decision, I concur with my brother, who concurs with me in rendering a judgment for the plaintiff; that is, to restrict the plaintiff's loss to the sum originally loaned. To this must be added the amount of interest received by the defendant, according to the terms of the award.

SEDGWICK, J. This case has been very fully and very learnedly argued; but it is unnecessary, in the view which I have taken of it, to consider the various points which have been made and discussed. The *legal* merits of the case, in my opinion, lie within a very narrow compass.

Upon the loan of the money which is demanded, a specialty for the repayment of it was given; a bottomry bond, in a penalty to be void upon the happening of two events, which are expressed — 1. Upon the payment of the sum loaned, with the marine interest agreed upon, within twenty days after the safe arrival of the schooner at her port of discharge in this commonwealth.

This event never has taken place; the schooner has never arrived at any port in the commonwealth, nor has the money ever been paid. Thus far there can be no pretence that the defendant is discharged on the terms of the contract.

*2. The other member of the condition is thus expressed; "or in case the said schooner should be lost through perils of the seas, or by fire, or by enemies of the *United States*, while she is performing the said voyage or voyages," then the bond was to be *void*. The meaning of which undoubtedly is, [* 368]

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that if *such a loss* should occur, *the money loaned was not to be repaid.*

This was a contract which the parties had a right to make. It was perfectly fair, and is intelligible; and there is no legal or equitable reason why it should not be carried into effect. The only question then is, whether *such a loss* as the parties contemplated has occurred. If it has, the defendant can *under no form of action* be compelled to make payment. When a lawful contract is formed by parties, their respective rights and duties must depend upon the terms of it.

In the consideration of the former action, I had precisely the same opinion of the merits of it, that I now entertain. I then thought, and I still think, that if the loss contemplated by the parties had not occurred, the plaintiff was entitled to his money. It was, however, then my misfortune to think that no such loss had taken place. But my brethren were of a different opinion; and that opinion is conclusive as well upon me as upon the parties. One of my brethren said, "I think the facts in the case" (the same facts which are stated in that now under consideration) "I think the facts in the case bring it within one of the stipulated cases of loss." "I am satisfied that the taking, as alleged in the plea in bar, is to all intents a capture by the enemies of the *United States*; and if it had been so alleged by the defendant, the facts would have supported his plea." After stating the facts, he says, "*Here was a total loss, which discharged the defendant from his bond.*" And he states the question, to which his argument applies, to be, "whether any event, *within the condition of the bond*, has happened whereby the obligor is discharged from his contract." [* 369] My other brother * was of opinion that the loss sustained was either by *enemies of the United States*, or by *perils of the sea*, both which risks were undertaken by the plaintiff.

Both of the judges, then, who determined the former action in favor of the defendant, determined also that the loss had occurred, which, according to the terms of the contract, was to excuse the defendant from payment; and unless they had so determined, I cannot perceive that it was possible for them to have decided as they did. This determination I am now bound to respect, and to be guided by. How, then, stands the case? The plaintiff loans the defendant a sum of money, and in the contract of loan it is expressly stipulated, that on the happening of a certain event contemplated by the parties, the defendant should not be bound to make payment. That event has occurred, and is proved by conclusive evidence, as I deem the former judgment to be. In this view I think the plaintiff is not entitled to recover.

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Indeed, I know no instance in which a man can claim, on principles of law, a discharge from a contract, according to the stipulations of it, who can be bound on the ground of the contract afterwards; which is precisely what is claimed in the present case. And if this principle be correct, as I conceive it to be, the effect of the British treaty is not necessary to be considered.

To rectify a mistake, entertained by some of the profession, relative to my opinion in the former action, who supposed that I thought that the bond should have carried marine interest after the seizure of the vessel; I think it proper to observe that I never entertained that opinion. That was a question not necessary to be determined at that time, because, had the plaintiff recovered, the amount would have been a subject of equitable consideration. (*a*)

(*a*) [Nothing short of a total destruction of the ship will constitute such a loss as to discharge the borrower of money upon bottomry.—*Thomson* vs. *The Royal Ins. Co.* 1 *M. & S.* 30 — ED.]

[* 370]

* ANONYMOUS.

Where a practitioner in this Court held a paper, delivered to him by his client, which the grand jury were desirous of seeing, the Court held him not bound to produce it.

MR. SOLICITOR GENERAL DAVIS suggested to the Court that the honorable Mr. *Dane*, a counsellor practising in this Court, having been examined as a witness by the grand jury, it appeared on his examination that he held in his possession a certain paper, purporting to be a promissory note, which, on behalf of the commonwealth, Mr. *Solicitor* was desirous to lay before the grand jury, believing that public justice might be promoted thereby; but which Mr. *D.* had declined producing without the direction or advice of the Court; which the solicitor general requested might be given accordingly.

Mr. *Dane*, being in Court, and having stated that the paper in question had been delivered to him by his client, to be used in the defence of an action now pending in this Court, expressed a willingness to deliver it to the clerk of the Court, to remain in his keeping, if the Court should advise him that it was his duty so to do.

Per Curiam. We can give no such advice. This paper was intrusted to Mr. *Dane*, as a counsellor or an attorney of the Court. It is in the keeping of his client, as much as if it were in his own pocket

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Non constat that it will ever be produced. The party may repent of his ill intention, and any crime contemplated may never be committed.

Note. — It seemed to be understood that this paper was a forged note, upon which the grand jury might have founded an indictment against Mr. *D.'s* client.

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*JOHN HATHORN AND OTHERS, Appellants, *versus* JAMES KING, Executor.

On the question of the sanity of a testatrix at the time of executing her will, which was in issue to the country, the physicians were inquired of, whether, from the circumstances of the patient, and the symptoms they observed, they were capable of forming an opinion of the soundness of her mind; and if so, whether they from thence concluded that her mind was sound or unsound; and in either case they were required to state the circumstances or symptoms, from which they drew their conclusions.

Where the testatrix, at 11 o'clock in the morning, gave directions to her scrivener as to making her will, which she executed at 6, in the evening, and died two hours after, the jury were directed, if, at the time of giving the directions, she had sufficient discretion for that purpose, and at the time of executing the will she was able to recollect the particulars which she had directed, they might find her of sound mind at the time of executing the will.

THIS was an appeal from a decree of the Probate Court of this county, approving and allowing the last will of *Mary Norris*, deceased. — Among the reasons of appeal, one was, that the deceased was not of sane mind at the time of executing the will, and on this an issue was formed to the country.

On trial it appeared that the scrivener was called in at 11 o'clock in the morning of the 21st of March last, and received from the testatrix directions as to preparing her will. She was then very ill, and continued sinking until 6 o'clock in the evening, when she executed the will, and at a quarter past 8 o'clock the same evening expired.

The counsel for the appellants moved to inquire of the attending physicians, whether, *in their opinion*, at the time of executing the will, the deceased was of sound, disposing mind and memory.

This question had been heretofore confined to the subscribing witnesses, but it was urged that the opinions of skilful physicians, who were present, were of more value, and ought to be received

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rather than those of the witnesses, who might possess no skill, and had but slender means of forming an opinion.

On the other hand, it was said that the question of sanity must be determined by the conversation and actions of the party. These were the only standard. The examination proposed would put the physicians in the place of the jury.

Per Curiam. The physicians may be inquired of, whether, from the circumstances of the patient, and the symptoms they observed, they are capable of forming an opinion of the soundness of her mind, and if so, whether they from * thence con- [* 372] clude that her mind was sound or unsound; and in either case, they must state the circumstances or symptoms from which they draw their conclusions.

After the examination was finished, the evidence was minutely summed up to the jury by *Sedgwick*, J., and the jury were instructed by him (*Sewall* and *Parker*, justices, expressly concurring) that if they should be of opinion, that the testatrix, at the time of dictating the will, had sufficient discretion for that purpose, and that, at the time of executing the will, she was able to recollect the particulars which she had so dictated, they might find their verdict that she was of sound and disposing mind and memory at the time of executing the will. — And they found accordingly; and the will was proved, approved, and allowed by the Court.

Dexter and *Putnam* for the appellants.

Otis and *Prescott* for the respondent.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF SUFFOLK, MARCH TERM, 1812, AT BOSTON.

PRESENT:

HON. THEOPHILUS PARSONS, CHIEF JUSTICE.
HON. THEODORE SEDGWICK,† } JUSTICES.
HON. SAMUEL SEWALL, }
HON. GEORGE THATCHER, }
HON. ISAAC PARKER, }

GEORGE BURROUGHS, JUN., *versus* SAMUEL LOWDER AND OTHERS.

Where the Sessions had assigned certain apartments in the jailer's house, which was within the limits of the jail yard, as the chambers and lodging of debtors having the liberty of the yard, and such a debtor had passed his evenings in another chamber of the same house, with the permission of the sheriff and jailer, but had always slept in one of the rooms assigned by the Sessions, he was held to have committed an escape within the condition of his bond.

Such bond is good at common law, although not taken in double the amount for which the prisoner stands committed; and although the sureties therein are not inhabitants within the county; and in every such case the creditor shall recover the amount of his debt with interest.

DEBT on bond. The condition being set forth on oyer had, it appeared that the penalty was to be saved, if *Samuel Lowder*, one

† His honor, Judge *Sedgwick*, was prevented, by bodily indisposition from attending the greater part of the term.

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of the obligors, and a prisoner in the jail at *Dedham*, in the county of *Norfolk*, on an execution in favor of the present plaintiff, should thenceforth continue a true prisoner in the custody of the jailer, and within the limits of the said jail, without committing any manner of escape.

The defendants, in their *first* plea in bar, set forth specially a performance of the condition of the obligation.

*The plaintiff, in his replication, alleges that on the [* 374] 2d day of January, 1809, without his license, and against his will, the said *Lowder* passed out of the custody of the jailer, and out of the limits of the prison, and committed an escape.

This is traversed by the plaintiff in his rejoinder, on which an issue to the country is tendered by the defendants, and joined by the plaintiff.

In their *second* plea the defendants plead substantially, that the bond was not taken in double the amount of the debt and costs in the execution; And in their *third* plea, that the sureties in the bond did not reside or dwell within the county of *Norfolk*.

To the two last pleas the plaintiff demurred generally, and the defendants joined in demurrer.

On trial of the issue to the country before *Parker*, J., November term, 1810, it appeared, by a copy of the record of the Court of Sessions for the county of *Norfolk*, that in the year 1803, the *east* chambers of the house of *Samuel Daggett*, the jailer, with the joint use of the garret over those chambers, the kitchen, &c., with land west of the same to the highway, were assigned by the Sessions, as within the limits; and a lease had been executed by *Daggett* to the county of part of his house, comformably to the above-mentioned order.

It was proved, that *Lowder* had frequently been in the *south-west* chamber of *Daggett's* house, in the month of January, as late as 9 o'clock in the evening, the east chambers being uncomfortable and having no fireplaces; but that he always slept in one of the east chambers. — There was a passage from these chambers into the kitchen, and from that to the necessary house and well, and to the highway, without going into the west part of the house.

It was testified by *Daggett*, and by several of the magistrates of the county of *Norfolk*, that the whole of *Daggett's* house was considered as within the limits of the prison; and that the order of the Court of Sessions and *the lease were [* 375] limited to the east chambers for the accommodation of *Daggett*, that he might oblige such of the prisoners as should be refractory or uncleanly, to keep within those limits.

The jury were directed, that this testimony, though admitted

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was not to be considered as proper evidence against the order of the Sessions, and the lease of the jailer, which were conclusive as to the limits of the prison; and that *Lowder*, having continued out of the limits assigned by the Sessions, had committed an escape, notwithstanding the design of the jailer, and the members of the Court of Sessions, to indulge prisoners with the use of other rooms than those which had been duly assigned.

The issue was accordingly found for the plaintiff; and the verdict was to be set aside, and a new trial granted, if the said direction was wrong.

The cause stood over upon the verdict and demurrers to the last March term, for argument on the demurrers, and upon the motion of the defendants for a new trial of the issue in fact, for the misdirection of the judge to the jury; and it was then argued by *Prescott* for the plaintiff, and by *Davis* (solicitor general) and *Jackson* for the defendants.

Jackson stated the question upon the judge's report to be, whether evidence of a usage and custom, or indeed any evidence at all, was admissible to explain or control the order of the Sessions, and the lease taken by them. For if any such evidence could be received, the cause ought to be sent to a new trial, on the issue in fact; the judge having ruled that the order and lease were conclusive evidence as to the limits of the yard. — The object of personal imprisonment for debt is to make the situation of the prisoner inconvenient, so that he may be induced to pay his debt, if he be able, and thereby procure his discharge. The intent of the legislature, in giving a prisoner the liberty of the yard, and a convenient and comfortable apartment for a lodging-chamber, was [* 376] to lessen the rigors of * such imprisonment in cases where the prisoner's character would induce his friends to become responsible for his faithful adherence to the condition of the bond. It certainly could never be the intention, under pretence of doing him a favor, to intrap him into a forfeiture of double the amount of his debt, and at the same time to give his creditors ample security for a forfeiture thus inequitably incurred.

The point intended to be submitted to the decision of the Court by the second plea in bar is, that the bond, not being taken in conformity to the provisions of the statute, is void as being a bond for ease and favor. A bond for ease and favor is not necessarily to the sheriff; one to the sergeant at arms attending the house of commons was held void at common law. (1)

The statute gives the liberty of the yard only on condition that

(1) *Hardres's Rep.* 44. — *Keb.* 391.

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the debtor give bond, *with sufficient surety or sureties within the county*. Here the plaintiff confesses, by his demurrer, that the sureties were not resident within the county. The bond therefore is not conformed to the statute, and, the defendants contend, is therefore void.

Prescott cited the case of *Clapp* vs. *Cofran*, (2) to show that an escape had been committed by *Lowder* in being out of the apartments assigned by the Sessions in the evening. To control this assignment, evidence was given of the opinions or understanding of certain justices of the Sessions, and of the jailer. It seems useless to do more than state the point, to show its absurdity.

In the case above referred to, it was also settled that where a bond was taken for less than double the sum for which a prisoner is committed, as is the case here, though not within the statute, it is still a good bond at common law; but the debtor may be relieved against the penalty, by a judgment in equity for the sum due on the execution; and this, with interest, is all the plaintiff's claim in the present action.

* As to the plea that the sureties were not resident [* 377] in the county, it is a sufficient answer that this particular provision was introduced for the benefit of the creditor, that he might be able to judge of their sufficiency; but he may renounce a right introduced for his own benefit. Thus, in the case of *Bartlett* vs *Willis & Al.*, (3) it was held that the creditor might dispense with the approbation of the sureties by two justices of the peace, which was provided for his benefit. But it does not lie in the mouths of the obligors to make this objection. It was voluntary on the part of the principal and on the part of the sureties; and if good against the former, it must be good against the latter also.

The solicitor general argued that here was no escape. The order of Sessions, and *Daggett's* lease, he contended, included the land west of the east chambers of the house; and if the land was included, so also was the building upon or over the land. The Court will yield to a construction, even if barely plausible, which goes to the relief of the defendants against a circumstance arising merely from misapprehension and mistake. Here was certainly no intentional escape; but, on the contrary, the most studied and scrupulous adherence to what the debtor believed the true limits.

The opinion of the Court was delivered at the same term to the following effect by

PARKER, J. [After stating the declaration and pleadings, and the evidence and judge's direction at the trial.] A verdict having

(2) 7 *Mass. Rep.* 92. (3) *Mass. Rep.* 86.

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been found for the plaintiff, agreeably to the direction, a new trial has been moved for, on the ground that the said direction was against law.

But we are all of opinion that the direction given at the trial was right, and that the testimony given to the jury, which the judge directed them not to regard, might lawfully have been rejected; the only tendency of it being to control the operation of the order of the Sessions, which had become a matter of record, as well as of the lease of * *Daggett*, which alone made any part of his house apartments belonging to the prison.

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The statute of 1784, *c.* 41, entitled "an act for providing and regulating of prisons," in the ninth section provides that persons imprisoned for debt "shall be allowed to have a chamber and lodging in any of the houses or apartments belonging to the prison, and liberty of the yard within the same in the day time, but not to pass without the limits of the prison, upon reasonable payment to be made for chamber room, to be set and established by the Court of Sessions."

This statute undoubtedly contemplates houses belonging to the prison, other than and distinct from the prison or jail itself; probably upon the expectation of the legislature, that there would be a dwelling-house for the jailer or prison-keeper, within the precincts of the prison, provided at the expense of the county. In counties where there exists such a house belonging to the county, within the duly-assigned limits of the jail-yard, the Court of Sessions may appropriate any part of such house for the receiving and lodging of prisoners for debt, who have given bond for the liberty of the yard; and if no such appropriation be made by the Sessions, the jailer may lodge such prisoners in any apartments of such house belonging to the prison.

But the house occupied by the jailer *may be* no part of the prison, nor a house or apartment belonging to the prison, even although it may be within the limits of the jail-yard, unless there be some act of the justices of the Sessions making it such. Now, in the case before us, the house which the jailer occupied belonged to him, and not to the county, and made no part of the prison; until by his lease to the county, and their acceptance of said lease, the parts of his house described therein were adopted as apartments belonging to the prison. The residue of the house, not within the lease, remained the property, and in the possession of *Daggett*, the owner, and was not under * the control of the Court of Sessions, or of the sheriff of the county, and so could not be considered, in any view, as belonging to the prison, more

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than any other house belonging to any other person, which might happen to be within the limits of the jail-yard.

The evidence, which the jury were instructed to reject from their consideration, tended to prove that notwithstanding the order of the Sessions, and the lease, there were other apartments in *Daggett's* house belonging to the prison. But this could not be proved by parole; the only proper evidence was the order of the Court and the lease, which were before the jury.

But it is said, that although no part of *Daggett's* house but what is contained within the lease, should be considered as belonging to the prison, yet as, by the understanding of the justices, and the consent of the jailer, the westerly chamber had always been used by such prisoners as the jailer saw fit to indulge, for their accommodation in the evening until bed time, there being no fireplace in the easterly chambers, that prisoners might lawfully be there under such circumstances. It is, however, very clear that no understanding of the justices, or permission of the jailer, can alter, by enlarging or contracting the accommodations, which have been legally established for debtors; and it would be mischievous to give to jailers the power of discriminating between prisoners in the manner contended for. Every prisoner, who has given bond, is entitled to a chamber and lodging in the apartments of the prison, if he can pay for them; and no prisoner is entitled to any other indulgence, save the liberty of the yard in the day time.

But even by the testimony given, it appears that the justices and jailer did not contemplate a right in the debtor *to lodge* in the westerly chamber; but only to remain there until he should retire to bed, when he was to repair to one of the easterly chambers. Now, there is no pretence of a power in the justices to authorize accommodations for one part of the night, which cannot be used during * the whole night. In the day time only [* 380] the bonded debtor has the privilege of the yard; in the night time he may have any apartment belonging to the prison. Now the night time is fixed by law, and there is no apportionment of it, so that greater privileges may be enjoyed in one part of it than in the other.

It has, however, been urged with ingenuity, that the true construction of the order itself will bring the westerly chambers of *Daggett's* house, as well as the easterly, within the assignment; for it is said that the easterly chambers, together with the joint use of the garret and kitchen, and certain out-door privileges, as also the land west of the same to the highway, being assigned, and the westerly chambers being over land west of the premises, these westerly chambers come within the assignment.

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But this construction would be manifestly contrary to the intention of the jailer, who leased only the easterly part of his house, and contrary to the plain intent of the justices of the Court, who describe only the east chambers as within their assignment. Besides which, the land intended to be passed by the lease was, according to the most grammatical construction of the sentence, land lying westwardly of the house, and not land lying westwardly of the easterly part of it; which is the construction contended for in this argument. A new trial is not granted.

There are two other pleas in bar, to each of which there is a general demurrer and joinder. The substance of one of them is, that the bond was not taken in double the amount of the debt and costs in the execution; and of the other, that the sureties in the bond did not reside or dwell in the county of *Norfolk*.

It was contended by the defendants, that for these causes the bond is void.

With respect to the first, it has recently been determined by this Court in two cases, (4) that a bond given by a prisoner for debt, in which the penalty is less or more than double the [* 381] amount of the debt and costs in the execution, * although not a bond within the statute, so as to entitle the obligee, upon breach of the condition, to the whole penalty, is yet good at common law, and upon forfeiture judgment may be entered for the debt and costs only.

As to the other supposed defect in the bond, viz., that the sureties were not persons residing within the county where the bond was taken; this being contrary to a plain requisition of the ninth section of the statute, perhaps would deprive the obligee of the right to insist on the penalty. We do not, however, decide this point, the bond being for the other cause determined not to be within the statute. But there is no reason why the bond should not be good at common law, it having been voluntarily entered into for the benefit of the principal, to procure a relaxation of a lawful imprisonment, to which he could not have been entitled, without giving the bond.

Whether the sheriff could not be charged for an escape, he having permitted the party to pass out of close imprisonment, upon a bond not taken according to the statute, needs not now to be decided.

The bond is now accepted by the obligee, and he is entitled to a judgment of forfeiture, if the condition is broken. The second and third pleas are adjudged bad. Judgment must be given for the

(4) 7 *Mass. Rep.* 98, *Clap, Admx.* vs. *Cofran.* — *Ibid.* 200, *Freeman* vs. *Davis & Al*
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plaintiff, that the bond is forfeited; and the defendants may be heard in chancery.

The action stood continued to this term for a hearing in equity. From the examination of *Daggett*, and several of the magistrates of the county of *Norfolk*, it appeared that the prisoner *Lowder*, after the bond was executed, inquired, with much anxiety, as to the limits in the house, and was informed that the east chambers and the garret were appropriated as sleeping-rooms for debtors, but that the other parts of the house being within the limits, he might be in them in the day time. He accordingly slept constantly in the east chambers, but spent the days and evenings in the west chamber, where he was seen by the *sheriff of the county, in an evening, and was directed by him that he must not sleep in that room, but might tarry therein at other times. [*382]

Jackson argued that the Court, having authority in suits on bonds with penalties to give judgment for so much only as shall appear to be due in equity and good conscience, will here perceive that the escape was perfectly involuntary on the part of *Lowder*. Indeed, he exercised the most honorable and scrupulous diligence to ascertain his limits, that he might in no event invole his sureties. He was not chargeable even with carelessness. He was misled by the sheriff, the magistrates, and the jailer, on all whom it was most natural for him to place reliance. Such being the fact, it would savor of extreme severity to mulct his sureties in the amount of the whole debt, which exceeds six thousand dollars. The case of *Dole* vs. *Moulton* (5) was of an involuntary and inadvertent escape, where the facts and the statute of *New York* were very similar to those in the present case.

Prescott. That case has been since overruled in *New York*. But the cases of *Clap, Admx.*, vs. *Cofran*, and *Freeman* vs. *Davis & Al.*, in our own Court, have established the principle, that the judgment in equity shall be for the amount of the debt, with interest and costs.

Jackson, in reply. The point was not discussed in those cases. There the amount was small, and probably thought by the parties not worth making a question of. But here the amount is of a magnitude which calls for deliberation, before a party, perfectly free from a charge, amounting even to an indiscretion, shall be held liable for the whole sum, while the legitimate powers of the Court enable them to apply equitable principles to their decision.

(5) 2 *Johns. Cases*, 205.

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By the Court, (absent *Sedgwick*, J.) We consider this point as put at rest by the cases referred to. Nor is it unreasonable. The debtor's body is considered as a pledge for his debt. [* 383] It is not for him to say the pledge was inadequate. * If the sheriff is liable for the escape, it is clear that he must be answerable in the sum for which the debtor was held a prisoner Judgment must be entered for the debt and costs, with interest to this time.

BETSY LABOTIERE *versus* GEORGE LABOTIERE.

Where, upon a libel for a divorce, filed in the clerk's office, and served by leaving a summons at the respondent's last usual place of abode, it was suggested to the Court that he was out of the state, personal notice was ordered to be given, returnable at the present term; which being done, the Court proceeded to hear and determine the cause

THIS was a libel for a divorce *a vinculo* for the adultery of the respondent. The libel was filed in the clerk's office pursuant to the statute, and served upon the respondent by leaving a copy, with a summons, at his last usual place of abode in *Boston*, fourteen days before the commencement of the term. It being suggested that the respondent had been some time out of the commonwealth, and was now resident in the city of *New York*, the Court were not inclined to hear the cause without evidence that he had received personal notice of the pendency of the libel.

Whereupon Mr. *Solicitor General*, for the libellant, moved for further notice returnable at the present term; and the Court ordered such notice by serving the respondent personally with an attested copy of the libel ten days before the last day of March instant, the same to be proved by affidavit.

Such notice being afterwards proved, the cause was heard, and a divorce decreed.

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CALEB PEIRCE, Plaintiff in Error, *versus* LEMUEL ADAMS.

It is an improper practice to insert the particular errors in the writ of error; they should be stated in the *scire facias* to hear errors.

Error does not lie to reverse a judgment on the ground that a promissory note, filed in support of the action by the endorsee, was not negotiable.

THIS was a writ of error brought to reverse a judgment of the Court of Common Pleas for this county, rendered January term. 1807. The writ of error contained an assignment of the error relied upon; which was in substance, that [* 384] the original plaintiff, *Adams*, had recovered the judgment complained of, as endorsee of a promissory note made by *Peirce* to one *Pelatiah R. Bowers*, having declared on the same as payable to *Bowers* or order, and by him endorsed to *Adams;* whereas, in truth, the said note was not negotiable, being payable to *Bowers* only.

Bourne for the plaintiff in error.

By the Court. It is improper to insert an assignment of errors in the writ of error. It is sufficient to say in the writ that manifest error hath intervened. The errors should be stated in the *scire facias* to hear errors.

In the present case, the plaintiff in error cannot be relieved. It cannot appear to us, that the note, a copy of which is sent up with the record, was the note on which the action was brought. But at any rate, it was merely evidence; and the defendant should have objected to its admission at the trial. If his objection had been overruled, he should have filed his bill of exceptions, and there would have then been matter on record to support his writ of error. If judgment went by default, exceptions would lie also to the assessment of damages.

The only remedy the plaintiff in error now has, is by petition to this Court for a new trial. If, in such case, the promisee will not release his claim upon the note, we shall grant a new trial; but if he will release, there will be no occasion to reverse the former judgment, since the now plaintiff in error will have sustained no damage

Judgment affirmed

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* STEPHEN HIGGINSON AND OTHERS *versus* WILLIAM GRAY.

An agreement had been entered into between *A. B.*, an underwriter, and the assured, to abide the final determination of an action pending between the same assured and an incorporated company, who had insured for them upon the same risk. — On the trial of that action in this Court, the demand was not contested by the company, but a verdict against them was submitted to under the expectation of prosecuting a review; which they accordingly prosecuted and entered, having given bond therefor. — An adjustment afterwards took place between the parties to the action, the company paying the assured two thirds of a total loss, and relinquishing their claim to salvage; and the review was discontinued. It was held that *A. B.* was not bound by his agreement to adjust with the assured on the terms on which the company had adjusted the loss on their policy.

THE declaration was "in a plea of the case for that whereas the said *Gray*, at said *Boston*, on the first day of July, 1800, had subscribed a certain policy of insurance, which the plaintiffs had caused to be made upon the cargo of the ship *Diana*, of which the plaintiffs were the owners, and therein and thereby, for a valuable consideration therein mentioned, as the premium of insurance paid the said *Gray* by the plaintiffs, insured for them the sum of 3000 dollars on the same cargo, in which the plaintiffs were interested to that amount, and to the amount of all other sums by them thereupon insured for and during the voyage in the said policy described, and against certain risks, perils, and accidents in the same policy enumerated, which same cargo was afterwards totally lost to the plaintiffs by certain perils and risks enumerated in said policy, and in the course of the same voyage; whereby the said *Gray* became liable to pay the plaintiffs the said sum of 3000 dollars insured by him as aforesaid, as the plaintiffs then and there averred, and the said plaintiffs, at said *Boston*, on the first day of July, 1801, demanded payment of said *Gray* of said sum of 3000 dollars by him insured as aforesaid, due to them on account of said loss, as they then and there averred, which the said *Gray* then and there refused to pay; — and whereas the said plaintiffs, afterwards, at said *Boston*, on the second day of April, 1803, had commenced an action against *The Massachusetts Fire and Marine Insurance Company* on a certain policy of insurance made and effected with the said corporation for the plaintiffs on the same cargo, to insure the sum of 15,000 dollars on part of the same cargo, in the same ship, for and during the same voyage, and against the same perils, risks, and
[* 386] accidents enumerated in the policy * of insurance subscribed by the said *Gray*, to recover of and from the said

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Massachusetts Fire and Marine Insurance Company the sum by the said corporation so insured; which said suit was depending in the Supreme Judicial Court on the twenty-seventh day of July, 1804; and whereas the plaintiffs and the said *Gray*, on the said last-mentioned day, at said *Boston*, agreed to be bound and governed by the final determination of the action aforesaid; — and whereas the plaintiffs did then and there agree with and promise the said *Gray*, that if final judgment should be rendered against them in the said action against the said *Massachusetts Fire and Marine Insurance Company*, they would not sue nor prosecute any action against said *Gray* on the said policy subscribed by said *Gray*, nor demand nor claim any loss or damages from said *Gray*, on account or by reason of said policy; and the plaintiffs aver that the said *Gray*, in consideration of the promise aforesaid of the plaintiffs, did then and there agree to and with the plaintiffs that if final judgment in the said action of the plaintiffs against the said *Massachusetts Fire and Marine Insurance Company* should be rendered against said corporation, he, the said *Gray*, would thereupon pay to the said plaintiffs, at the same time said corporation should pay the amount of such judgment, the same sum in proportion to the amount by him subscribed on the policy first above referred to, as the sum so recovered against said corporation should be in proportion to the whole amount insured by said corporation; — meaning the amount recovered as and for damages, and exclusive of costs. — And it was then and there further agreed by and between the plaintiffs and the said *Gray* that if the said action of the plaintiffs against the said *Massachusetts Fire and Marine Insurance Company* should be reviewed by either party after one or more trials, the judgment on the last review should be considered as the final judgment referred to in said agreement. — Now, the plaintiffs in fact say that such proceedings were had in the same action of the plaintiffs * against the said *Massachusetts Fire and Marine Insurance Company*, that at the [* 387] Supreme Judicial Court holden at *Boston*, in the county of *Suffolk*, for the counties of *Suffolk* and *Nantucket*, on the fourth Tuesday of November, 1806, the plaintiffs, by the consideration of the justices of the same court, recovered judgment against the said *Massachusetts Fire and Marine Insurance Company* for the sum of 18,300 dollars damages, which sum the plaintiffs aver was in full of the sum of 15,000 dollars so insured as aforesaid by the said corporation, and interest thereon due to the second day of December, 1806; — And the plaintiffs further aver that the said last-mentioned judgment has in no wise been annulled or reversed, and that the said corporation, on the ninth day of October, 1808, at said *Boston*, paid and satisfied the said judgment with the interest due thereon; of all which the

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said *Gray* thereafterwards on the same day had notice and thereby became liable, according to his said last-mentioned promise and agreement, to pay to the plaintiffs another large sum, *viz.*, the sum of 4014 dollars; yet the said *Gray*, though then and there requested, hath never paid," &c.

The cause was tried before *Sedgwick*, J., at November term, 1810, on the general issue, and a verdict taken for the plaintiffs, subject to the opinion of the Court upon a case stated by the parties; it being agreed, that if the Court should be of opinion that the evidence contained in the case stated was sufficient to support the plaintiffs' action, judgment should be entered on the verdict, with increase of damages for interest to the time of the judgment, without a right of review for the defendant; otherwise the plaintiffs were to become nonsuit, and the defendant to be allowed his costs.

The case agreed by the parties was as follows, *viz.*: —

"This action is *assumpsit* on a special agreement set forth in the declaration, and filed in the case. — By an attested copy of the proceedings in the action, referred to in the agreement,
[* 388] against the *Massachusetts Fire and Marine* * *Insurance Company*, it appears that at the November term of this Court, in the year 1806, a verdict was returned in favor of the present plaintiffs, and judgment was rendered thereon at the same term. The record and proceedings in that case are to be considered as parts of this statement. It is admitted that *the plaintiffs' claim was not contested* at that trial, and that the verdict was submitted to by the defendants in the action, under the expectation at that time of prosecuting a review; but there was *no assent of the plaintiffs that the verdict should pass pro formâ.* — On the 19th of October, 1808, *an adjustment* took place between the parties to that action, as appears by the paper of that date in the case."

[The paper referred to purports a receipt, by the plaintiffs, from *the Massachusetts Fire and Marine Insurance Company*, of the sum of 13,952 dollars 75 cents, in full of all demands for loss on the policy on the *Diana's* cargo, this day adjusted by compromise, the said company relinquishing all claims for salvage.]

"This adjustment took place after a writ of review had been sued out, and the action of review had been entered, as will appear by the copy of the record of that action, which is referred to, as in the case.

"At the said November term, 1806, the said company endeavored to procure a continuance of said cause, in the hope or expectation of obtaining some other or further evidence; but the continuance was not allowed. After this judgment, the said company gave bond in due form of law for prosecuting the said action of review.

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"It was also admitted that the *Boston Marine Insurance Company* had made a like insurance for the plaintiffs on the same vessel, cargo, and voyage; and an action brought by the plaintiffs on that policy had been tried at the November term of this Court in the year 1805, when a verdict was rendered for the plaintiffs. — On the said last-mentioned trial, the defendants therein offered and availed themselves of all the evidence in their possession, and * neither they, nor the said *Massachusetts Fire and* [* 389] *Marine Insurance Company*, nor any other underwriters on said vessel, cargo, and voyage, have procured any other or further evidence since the said trial in November, 1805. The trial in 1806 was had before the same judge, who tried the said cause in 1805. — The *Boston Marine Insurance Company* prosecuted a review of the aforesaid action against them, which was discontinued upon making the settlement herein after mentioned. — The president of the *Massachusetts Fire and Marine Insurance Company* testified that a settlement having been made by the plaintiffs with the *Boston Marine Insurance Company*, on their policy before mentioned, the terms of which settlement he knew, and a copy of which is in the case, Mr. *Otis*, who was counsel for the plaintiffs, proposed to him to settle the action then pending upon the same terms; — that having in a short time consulted the directors, with their approbation he agreed so to settle, and informed Mr. *Otis* of his determination. The adjustment soon after took place according to the paper before referred to. He also testified that it was known that a decree of restitution of the property had been obtained; but that difficulties existed, which rendered a final restitution, or the amount of it, very uncertain; — that the prospect of success had varied at different times, intelligence being sometimes favorable, and sometimes other wise; — that when the adjustment was made, there was no estimate made by him of the probable value of the salvage; but he agreed at once to settle on the same terms as the *Boston Marine Insurance Company*. — The same witness likewise testified that the review was prosecuted with the intention to try the merits of the cause; that the company, together with the other company, and the underwriters on the policy in Mr. *Brooks's* office, had been at considerable pains and expense to obtain an authenticated copy of the laws of *Spain* relative to trade with her colonies. A person had been sent *to Madrid* for that purpose, who obtained certain documents, which, however, were thought by the counsel for * the companies to be insufficient, and [* 390] were not offered in court at any trial, though the agent who procured them was in court when the trial was had. — Mr. *Brooks*, insurance broker, among other things, testified that the first

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adjustment was made by him for some of the underwriters upon the same policy which was subscribed by Mr. *Gray.*"

Upon these facts the cause was argued at the last March term in this county, by *Otis* and *Jackson* for the plaintiffs, and *Dexter* and *Prescott* for the defendant.

Jackson. There cannot be a doubt that the intention of the parties, in making the agreement declared on, was to conform to such a result as has taken place. Two actions were pending on similar policies against two incorporated companies. The defendant might naturally rely on their judgment and attention to their interests, and submit to be governed by the terms they should accede to. If that arrangement had not been made, seventeen other actions must have been brought, when in fact one question alone was to be tried. The agreement was in its nature like a consolidation rule, but stronger than that, as in this case the other underwriters had no control over the action by which they were to be governed. They agreed to be governed by the issue of the suit against one of the companies, who stood, in effect, as arbitrators between these parties.

As to the review commenced and afterwards abandoned, all that can be inferred from it is, that the company at the time were dissatisfied with the judgment on the verdict, that they might entertain hopes of altering the state of the evidence on another trial, and thought it discreet to secure to themselves that chance by interposing a review; but that afterwards, finding the chance a hopeless one, they discontinued the review, and paid a total loss, deducting therefrom what the expectation of salvage might be estimated at.

The agreement, on which the action is brought, is not a sealed instrument, and a liberal construction may be applied to [* **391**] it. In the recital it is said the parties had agreed * to be bound by the *final determination* of the suit against the company, not limiting it to a *judgment;* and the use of other language in the latter part of the instrument may well be considered as merely an amplification of the other expression, — rather than an alteration of the terms of the agreement. Nor can a doubt be entertained that, if the parties had anticipated such a final adjustment as was made between the plaintiffs and the company, they would have explicitly agreed to be bound by it.

If the company had suffered judgment to go against them by default, the defendant would unquestionably have been bound. But it certainly is a much stronger case for the plaintiffs, that after a full trial had been had between the other company and the plaintiffs, the whole detail of which was known to this company, these latter should see fit to discontinue their review, and pay a total

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loss. For a total loss was in fact paid, and the only compromise respected the value of the salvage the company were to give up, or rather of the *spes recuperandi* — the prospect of ever recovering it.

The review, commenced and afterwards discontinued by the company, is to be considered as if no review had ever been instituted. It was never prosecuted to *final judgment.* The judgment in the original action was then the final one. That was for a total loss, and the defendant was bound by law, as well as by principles of integrity and honor, to have conformed to it on his part.

Dexter and *Prescott.* The parties to this agreement meant to abide by a judgment which might be rendered on a satisfactory trial of the merits of the question, and by such a judgment only. This judgment was to be in the action to which the *Massachusetts Fire and Marine Insurance Company* was to be a party. Now, in that action no such judgment has been rendered, no such trial has been had. The policy in the action against the other company might have been differently expressed, or the questions in issue might vary. It was the final determination of *the action* * that was contemplated, which must intend final *judgment,* as afterwards appears in the agreement itself. If a review was instituted, then was intended the final judgment on the review; and if there was no judgment rendered on the review, after it was commenced, then there was no judgment, to which the parties were bound to conform; for the very commencement of the review suspended the whole effect and operation of the first judgment. [* 392]

Besides, to hold the defendant bound by a judgment rendered without any trial or opposition on the part of those who were in the same interest with himself, would be to intrap him, in violation of common sense and common justice. The loss was adjusted with the company by a compromise, and not by a satisfaction of a judgment. They paid two thirds of the amount insured by them, and for that received a full discharge of the policy. Now, the defendant certainly never agreed to be bound by any compromise, which the parties to the other action might think fit to make out of court.

This agreement may well be compared to a consolidation rule. But it will be remembered that, by such a rule, the defendants undertake to be bound only by such a verdict as ought to stand as a final determination of the action; (1) in other words, such a verdict as may be rendered on a full and fair trial of the merits; not, as was the case here, a mere formal verdict given for the plaintiffs, because the defendant, contemplating a review, made no defence

(1) *Marshall,* 605.

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Otis, in reply. The defendant is bound by the very terms of his engagement. He engaged to pay when a final judgment was rendered in the action of the plaintiffs against the company. This must mean the judgment of this Court, the highest appellate jurisdiction in the state, in the action then pending. That judgment was final. But because the law of the land has allowed, in certain cases, to parties aggrieved by such final judgment, a privilege to institute a new suit, by a writ of review, it was therefore further agreed, that if a review in that case should be brought
[* 393] and * prosecuted to final judgment, then such judgment on the review should be the judgment by which the parties to the agreement should be bound. But if there should be no such judgment on the review, then the judgment of this Court in the original suit was to be considered as the final judgment for this purpose. Thus, again, if, on the first judgment, the company had paid the sum recovered, and afterwards within the time limited by law therefor, they had brought their review, and had obtained a reversal of the former final judgment, then the plaintiffs, being held to repay the company, agreed also to return to the defendant the money he should have paid pursuant to the agreement. If the company had confessed judgment in the original action, always excluding the idea of fraud, the defendant would have been bound by such judgment, as much as if it had been rendered upon a verdict given after the most serious and strongly contested trial. In short, the plain and apparent meaning of the defendant, in this agreement, was that he would submit the question of a loss to the judgment and discretion of the company, and would be bound accordingly.

A difference, essential in the view we take of this question, between the agreement in this case and the common consolidation rule, is, that the latter is always made to depend on a verdict; whereas here the defendant was bound by a judgment, though rendered by confession or consent of the company. He was bound by the judgment, not by the compromise, if such it is to be called. Nor has he any concern with the manner in which the plaintiffs adjusted their claim under the judgment which they obtained against the company; although in a trial by the jury, the amount received might perhaps plausibly enough be considered by the jury as the proper measure of damages.

The cause stood continued to this term for the opinion of the Court, which was now delivered, as follows, by
[* 394] *SEDGWICK, J. This is an action of *assumpsit*, brought on a special agreement, entered into between the parties on the 27th of July, 1804.

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On the 1st of July, 1800, the plaintiffs obtained an insurance on the cargo of the ship *Diana* for twenty months, at a premium of one and a half per cent. per month; and the defendant subscribed as an insurer for 3000 dollars.

The *Boston Marine Insurance Company*, and the *Massachusetts Fire and Marine Insurance Company*, also insured on the same voyage.

During the course of her voyage such occurrences took place, that the plaintiff claimed a total loss against the several underwriters; and actions were commenced against both the corporations on their respective policies.

The action against the *Boston Marine Insurance Company* was tried in November, 1805, and a verdict rendered in favor of the plaintiffs, as for a total loss. This action was reviewed, and, during the pendency of the review, was compromised by an adjustment, whereby the insurers relinquished to the assured all right of salvage, and paid a gross sum, which was received by the plaintiffs in full satisfaction.

In November, 1806, the action against the *Massachusetts Fire and Marine Insurance Company* came on for trial before the same judge who tried the action before mentioned. The defendants endeavored, without effect, to put off the trial, under a hope of obtaining more evidence. Under these circumstances the claim of the plaintiffs was not contested; and they obtained a verdict for a total loss, on which judgment was rendered. After judgment the defendants gave bond according to law to prosecute a review of that action. This took place before an adjustment was made with the *Boston Marine Insurance Company*. After that a compromise was effected between the plaintiffs and the *Massachusetts Fire and Marine Insurance Company*, on the same terms with that of the *Boston* company, and payment was made in conformity thereto, and the motives * and considerations are detailed in the case re- [* 395] ferred to the decision of the Court; but they are not, in my opinion, of much importance. — The question is, whether, under the circumstances, the plaintiffs are entitled to recover, upon the agreement, an amount equal to what they would recover for a total loss in an action upon the policy?

In their behalf it is said, that the defendant is bound by his agreement to pay a total loss, because the judgment against the *Massachusetts Fire and Marine Insurance Company*, by which he was to be bound, was for a total loss; and this is right, provided *that* judgment be such a judgment, as, according to the true intent and meaning of the parties, was to be binding on the defendant; and provided also the payment made by the company was a payment of that judgment. — But if that judgment, according to the meaning

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of the parties, was not a final judgment, or if the payment made by that company was not a payment made on that judgment, the plaintiffs cannot recover.

The parties agreed to be governed and bound by the *final* determination of the action against the *Massachusetts Fire and Marine Insurance Company*. If the final judgment should be rendered against the plaintiffs, they were to prosecute no action against the defendant; and the defendant, and the other underwriters, who subscribed the agreement, if *final* judgment was rendered against the company, were to pay, in proportion to their respective subscriptions, as the company by such judgment should pay for *damages*. The agreement then proceeds to define what the parties meant by *final* judgment. If the action should be reviewed by either party, after one or more trials, a judgment on the last review was to be considered the *final* judgment; but if judgment should be given against the company, and the money should be paid, before or without any review, the subscribers to the agreement were to pay, in proportion and manner agreed upon, without waiting on account of the possibility or chance that such review might take place. And they conclude the agreement by providing that if after
[* 396] payment, * there should be a review, the *final* adjustment shall conform to the judgment upon that review.

The subscribers then were to pay in the same proportion, as damages should be assessed in a *final* judgment against the company, and at the time when the company should pay. — Was the payment made by the company a payment, in the sense of the agreement, of a final judgment? The obligation assumed by the underwriters, who subscribed the agreement, was to pay when the company should make a payment on a particular event, and for a specified cause. What payment was this to be?

A payment upon a *final* judgment. But in this case no payment was made on any judgment. A settlement was first made with the *Boston* company, and then a settlement with the *Massachusetts* company upon the same principles; according to which principles an adjustment was made, to ascertain the amount to be paid, which was paid upon that *adjustment*, and not upon any *judgment*. The event then never occurred, upon the happening of which the defendant undertook to pay. The plaintiffs cannot then recover upon the terms of the contract, nor can they, in my apprehension, claim upon any reasonable construction of the nature of the transaction.

In this case the claim of the plaintiffs was of a very large amount, distributed among a considerable number of individuals, besides two incorporated companies. Actions against the companies were commenced; and to prevent a multiplicity of suits, an agreement,

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in the nature of a consolidation rule, was entered into, by which the plaintiffs and the underwriters agreed, in substance, that upon a *final* judgment in one of the actions, — that against the *Massachusetts Fire and Marine Insurance Company*, — the underwriters would pay, as the rights of the plaintiffs should be ascertained by that judgment; — and contemplating the case of a review, they particularly state, that if there should be one, *final judgment*, which they meant, was the judgment that should be rendered upon it; that is, it must, to be binding, be such a judgment as that company should * submit to, and be willing to pay, without further [* 397] litigation; or such a judgment as should be compulsory upon them.

The defendant did not agree, however reasonable it might have been that he should so have agreed, that if a review should be brought, and thereupon a compromise should be made, an adjustment in pursuance of that compromise should form a rule, by which the other underwriters would pay. The case, then, which has happened, is *casus omissus*, and not a subject of the contract made by the parties. Without express words to that effect, it can hardly be supposed that parties would agree to be bound, as it is said these underwriters were. It is contended they are bound by the judgment; and yet it is admitted that the verdict, on which the judgment was rendered, was submitted to without any trial in fact, and so submitted to with an intention that the judgment should not be *final*, but merely the foundation of a review; a judgment which could not be enforced by execution, which was prevented by entering into the bond to review; a judgment which was not to be the foundation of an action of debt; but where the remedy of the other party must be a future judgment in the action of review, or on the bond, or on both, as the case might be. Such a judgment could not be the *final* judgment contemplated by the parties, as the foundation of an obligation on the part of the underwriters.

The case under consideration seems to me to compare, as to the resulting obligation of the parties, to that of a consolidation rule. There the parties undertake to be bound by a verdict in a certain action, and yet, although the agreement is absolute to that effect, a verdict, to be binding, must be satisfactory to the court. (2) This is from the reason of the thing, So when the defendant and others in this case agreed to be bound by a final judgment, it must be understood that such a judgment was intended, as proceeded from a real trial, in which the claims of the plaintiffs were

(2) 1 *W. Black. Rep.* 463, *Hodgson* vs. *Richardson*. — 3 *Burr.* 1477, *S. C.*

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contested, and not a judgment which was submitted to for the very purpose of being overthrown in an action of review.

Plaintiffs nonsuit.

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*ROYAL PETERS *versus* JONATHAN PEIRCE.

In debt on bond to perform an award, the defendant, after oyer, alleges a performance of the award, by payment two days after the award, to the partner of the plaintiff, (not party to the bond, but whose joint concerns with the plaintiff were referred to the arbitrator,) of three several sums of money awarded to be paid by him: — the plaintiff replies a demand by him on the day of the award made, and a refusal by the defendant: — the replication was adjudged bad.

DEBT on bond for 2000 dollars, dated June 17th, 1809. On oyer it appears that the bond was conditioned for the performance of an award of one *Calef*, to be made of all demands subsisting between the plaintiff and one *Powers*, then late his copartner in trade, of the one part, and the defendant of the other part.

The defendant, in his plea, sets forth an award, made on the 8th of July, 1809, in these words, *viz.:* "This may certify that, after examining all the business referred to me, I find said *Jonathan Peirce* indebted to *Peters* and *Powers*, which he shall pay, five hundred and twenty-six dollars and forty-one cents; and that said *Peirce* holds two lots of land belonging to *Peters* and *Powers* as security for notes he holds against them; which land the said *Peirce* shall re-deed to *Peters* and *Powers* on demand of said *Peters* and *Powers*, or pay the sum of ten hundred and twenty dollars for the same. Said *Peirce* shall pay the costs which have been incurred, amounting to sixty-one dollars and fifty-one cents." The plea then alleges an exact performance of the award, by payment of the three several sums awarded, to *Powers*, in behalf and to the use of *Peters* and *Powers*, on the second day after the award was made, *viz.*, on the 10th of July in the same year.

The replication, to avoid the bar, protesting that the defendant never paid the said sums of money or any part thereof, as he has alleged; protesting also that the said *Powers* never was in any way authorized or empowered by him, the said *Peters*, to receive the same sums, or either of them; alleges that the award was published on the day on which it was made, *viz.*, on the 8th of July; that afterwards, on the same day, the plaintiff demanded payment of the

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sum of 526 dollars 41 cents first mentioned in the award; he having been first authorized by *Powers* to act in the premises, and to settle all accounts, debts, dues, and * demands, [* 399] relating to the firm of *Peters* and *Powers;* which the defendant then and there neglected and refused.

The defendant, after oyer of the letter of attorney from *Powers* to *Peters*, (by which it appears that he was authorized to settle all accounts, dues, and demands relating to the business of the late firm of *Peters* and *Powers*,) demurs generally to the plaintiff's replication, and the plaintiff joins in demurrer.

The cause was argued at the last March term in this county by *Smith* for the plaintiff, and *Fuller* for the defendant; and being continued for advisement, the opinion of the Court was delivered at this term by

SEDGWICK, J. [After stating the declaration and pleadings.] The defendant calls in question the validity of the award; and so far as respects the costs awarded, I think the award bad, because, by the submission, no power was given to the arbitrator for that purpose; and without such power he has no authority to award costs. (1) But this forms no objection to the plea; as well because no question, relative to the costs, is referred to the Court by the pleadings; as because an award may be good in part and bad in part, provided the different matters in each be distinct and independent of each other. (2) With regard to the other sums awarded, I think the award good.

That a liberal construction should be given to awards, is now universally agreed. This award is perfectly intelligible, and is, I think, mutual and final. It has been frequently determined that where an award has directed money to be paid, or an act to be done, by one of the parties only, it is sufficient if the award appears to be made *de et super præmissis*. (3) The reason is, that in such a case, a performance on one part will operate as a release on the other. Now, the expression *of and concerning the premises* has no peculiar effect more than any other expression of the same meaning; and I think that the arbitrator, when he says, as in this case, that *after examining all the business referred to him*, he makes his award, expresses * his intention that it shall [* 400] be a final decision of the subjects referred to him, as clearly as he would have done, if he had expressed his award to be

(1) *Willes' Rep.* 62, *Candler* vs. *Fuller.*
(2) *Ibid.* 64.
(3) *Com. Rep.* 330, *Tomlinson* vs. *Arriskin.* — 1 *Wils.* 28, 58, *Cayhill* vs. *Fitzgerald* — 2 *Wils.* 267, *Fox* vs. *Smith.* — 1 *Burr.* 274, *Hawkins* vs. *Colclough.* — 1 *L. Raym.* 246 *Bacon* vs. *Dubarry.*

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made of and concerning the premises. Nor in any view is the objection, as to the uncertainty in relation to the deeds, of any avail; because that part of the award is not, by the pleadings, referred to the Court.

The question then occurs, whether the defendant has shown, by this plea, a good bar to the plaintiff's demand. He sets forth the award according to its tenor, by which it appears that the arbitrator awarded three several sums of money to be paid by the defendant; and he then avers that, on the second day after the making of the award, he paid those several sums of money to *Powers*, one of the parties, who, by the award, was undoubtedly entitled to receive them. If no sufficient answer can be given to these allegations, they surely must, as well in law as in common sense and common justice, bar the plaintiff; for it appears by the case of *Veale* vs. *Warner*, (4) reported in the excellent reports of *Saunders*, rendered still more valuable by the notes of Mr. Sergeant *Williams*, that when a man is sued on a bond, for not performing an award, the defendant may, as was done in this case, set forth the award, and plead performance of it; or he may plead *nul agard*, and leave it to the plaintiff to set it forth. The defendant has elected the former method, and has alleged an exact performance. This presents the last question in the case — Has the plaintiff avoided the defendant's plea by his replication?

The plaintiff says, in his replication, that having a deed from *Powers* to act for him in the premises, and to settle all accounts, debts, dues, and demands, relating to the business of the partnership; before the *tenth* of July, when the money was paid, that is, on the *eighth* day of July, the day the award was made, he, the plaintiff, demanded of the defendant the sum of 526 dollars 41 cents, the sum first mentioned in the award, which sum [* 401] the defendant *then and* * *there* wholly neglected and refused to pay. But he does not deny (except by *protestando*, which can have no effect to that purpose) that the money was afterwards paid, as set forth in the defendant's plea in bar.

That the letter of attorney can have no effect is manifest; because it is not alleged that the defendant, when the money was paid, had notice that any such power existed; and *de non apparentibus et non existentibus eadem est lex.* But the power itself, as alleged in the replication, and as appears upon the oyer of it, does neither authorize *Peters* to receive the money of the company *to his own use*, nor *restrain Powers* from receiving it. It might have given a very different complexion to the transaction, if the letter of attor-

(4) 1 *Saund.* 324.

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ney had contained an assignment of the company's *choses in action* to the *sole* use of the plaintiff, and if the defendant, at the time of the payment to *Powers*, had known its contents.

I will now observe, that I think that from the pleadings we are to take it for granted that the payment was made to *Powers* on the tenth day of July. It is so alleged by the defendant; and although the precise day alleged is not *generally* material, nor necessary to be proved, yet as the plaintiff, in his replication, has alleged his demand before the *said tenth* day of July, *that day* is admitted to be the day when payment was made to *Powers*. How then are the facts? — On the eighth of July, the arbitrator awards, so far as respects the subject before us, 526 dollars 41 cents to be paid to *Peters* and *Powers*, and no time is fixed for the payment. It ought to be paid in a reasonable time; and a payment to either would undoubtedly be good. Instantly after the award is made, the payment is demanded; and within two days after, and before the commencement of the suit, it is made. The money is advanced by the one and received by the other; for this is included in *payment*. There can be no doubt that such payment is a discharge.

Replication adjudged bad

[*402]

*THE NEWBURYPORT MARINE INSURANCE COMPANY *versus* FRANCIS J. OLIVER AND ANOTHER.

The plaintiffs insured for the defendants the freight to be earned by their ship in a voyage from *Teneriffe* to *Jamaica*. The ship being captured by the *French* and recaptured by the *English*, a salvage of one half was decreed to the recaptors. The balance of freight being paid into the master's hands, he delivered it to the owners, the defendants, who claimed a total loss of the plaintiffs. This was paid pursuant to the opinion of arbitrators, neither the plaintiffs nor the arbitrators then knowing that the defendants had received any part of the proceeds from the cargo as freight. The defendants afterwards remitted the money received by them to the freighters; and they were held not to be accountable for the same to the plaintiffs, the underwriters.

THIS was an action of *assumpsit* for money had and received.

At the trial, which was had on a review at the term of this Court in November, 1809, before *Parker*, J., the plaintiffs rested their case on the following facts proved or admitted, *viz.*: In March, 1800, they insured for the defendants 5000 dollars on the freight of the ship *Columbia* from *Teneriffe* to *Jamaica*. The said ship was laden

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at *Teneriffe* with a cargo of wine belonging to Mess. *Pollard & Co.* of *London*, which was to be transported to *Jamaica* at 3*l.* sterling per pipe. On her passage the ship was captured by a *French* privateer, and after being in possession of the captors more than 96 hours, was recaptured by a *British* armed vessel, and carried into *Antigua*, having in her way been damaged by getting on rocks. The ship and cargo were libelled in the Vice Admiralty Court at *Antigua*, for salvage, and ordered to be sold, and one half the gross proceeds to be paid to the captors, and the other half, after deducting all costs, to be paid to the master, for the use of the owners and all concerned.

The master testified that he could find no agent of Mess. *Pollard & Co.* in *Antigua*, but understanding that a Mr. *Colquhan* was their friend and correspondent, he employed said *Colquhan* to assist him, and placed the proceeds of the cargo in his hands, to be remitted to the owners in *London*, except the sum of 521*l.* 19*s.* 5*d.* sterling, being the balance of account in his hands, which he retained and paid over in a bill of exchange to Mess. *Oliver* and *Procter*, the present defendants, as the freight *pro ratâ itineris*, in case they should be entitled to such; but otherwise to be remitted to Mess. *Pollard & Co.*; the master * being ignorant, as he stated, whether freight was due or not, or whether that sum was due, if any.

[* 403]

The defendants, having abandoned to the underwriters all their interest in the freight, claimed of them payment of a total loss, which was refused by them. The question was submitted to the dicision of *J. Russel* and *T. Dennie*, *viz.*, "whether all, or what proportion of said freight, was due from the plaintiffs, or from Mess. *Pollard & Co.*, the freighters in *London*;" and the arbitrators having determined that the company were liable for a total loss of the freight, the sum of 5000 dollars was paid to the defendants on their receipt; and an assignment of the right or interest in the freight was made to the plaintiffs on the back of the policy, with a power of attorney to recover the same.

The plaintiffs alleged, in support of their action, that although at the time of the demand on them for a total loss, and of their agreement to submit the question to arbitrators, the defendants had in their hands the above-mentioned sum of 521*l.* 19*s.* 5*d.* of the proceeds of the cargo on account of freight, they gave no information of that fact to them, nor afterwards, at the hearing of the question, did they make it known to the arbitrators, nor was it ever made known to them by the defendants; but was accidentally discovered by the plaintiffs in the adjustment of another concern between the same parties. And they contended that freight being due for that part of the

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cargo, which came to the hands of the correspondent of the freighters at *Antigua, pro ratâ;* although the defendants had, after the decision of the arbitrators, remitted the sum before retained on account of freight to Mess. *Pollard & Co.*, yet the plaintiffs were entitled to recover said sum; because they ought to have been informed that such money was on hand for that purpose; and they further contended, that from the terms of the submission and the subsequent proceedings, it was apparent this circumstance was concealed from the plaintiffs by the defendants.

* The defendants contended that under the circum- [* 404] stances of this voyage, no freight was due from Mess. *Pollard & Co.*, and that if it were, the submission and proceedings thereon precluded the plaintiffs from now demanding it of the defendants, they being by these proceedings justified in remitting the amount to *Pollard & Co.*, to whom alone the plaintiffs ought to resort for payment. They also insisted that no concealment had been proved by the plaintiffs, who were bound, in support of their action, to prove the same; but that, on the contrary, it ought to be inferred from the facts in the case, (*viz.*, that the decree of condemnation had been laid before the officers of the company, as also other papers touching the loss,) that they had full knowledge of the aforesaid sum being in the defendants' hands. There was no proof that the account of the master, containing the charge on account of freight, was exhibited; but it was said, that this was to be inferred from the ordinary course of business, and the accustomed vigilance of underwriters. The master's testimony was relied on to prove, that the company's officers knew the fact, or that they might have known it with ordinary prudence; and so that they were liable to the consequences of their own negligence. — Upon this point he testified that he had made no secret of his having brought home a bill of exchange on account of the freight, and having delivered it to his owners: on the contrary, he mentioned it to several persons, but did not know to whom; that he went with Mr. *Oliver* to *Newburyport* on account of the insurance, when he was ready and willing to answer any questions that might have been put to him.

The referees were also examined as witnesses, but they did not recollect any information from any persons, that any thing had been received or retained on account of freight.

It appeared that *Pollard & Co.* had insured the cargo in *England;* and had abandoned their interest to the underwriters there.

* The jury were instructed, that if the cargo, or any [* 405] part of it, or the proceeds thereof, were received by the agent or correspondent of Mess. *Pollard & Co.* at *Antigua* to their

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use, freight was unquestionably due for so much as was received, *pro ratâ itineris*; — that if the insurance company, or its officers, knew either by information from the defendants, the master of the ship, or from any other source, that the sum before mentioned was reta ned on account of freight; but that they neglected to communicate the fact to the arbitrators, and afterwards paid the whole amount of the loss to the defendants, the remittance made by the defendants to *Pollard & Co.* would discharge them; and the plaintiffs must look to the latter for freight; — but that if the plaintiffs were not made acquainted with the fact, and had no means within their power, with ordinary vigilance, to ascertain it, notwithstanding there was no evidence of any fradulent intention in concealing it, the payment over by the defendants was in their own wrong; — that therefore they must refund to the plaintiffs what ought to have been deducted, when they received payment of the loss, with interest, and must seek their indemnity against Mess. *Pollard & Co.*, to whom they had remitted it under a mistake.

A verdict being returned for the plaintiffs, a new trial was moved for by the defendants, 1. Because, on the state of the facts to be reported by the judge, the judge ought to have directed the jury to have found their verdict for the defendants. — 2. Because the jury, on the evidence delivered, ought to have rendered their verdict in favor of the defendants, or if for the plaintiffs, for a sum much less than the one contained in the verdict.

The cause was argued upon the foregoing report of the trial, at the last March term in this county, by *Dexter* and *Jackson* for the plaintiffs, and *Amory* and *Otis* for the defendants.

Amory. The parties, having submitted the question to arbitrators mutually chosen, are bound by their decision, [* 406] * be it what it may. The defendants made a regular abandonment, and gave authority to recover from the freighters whatever might be due for freight, if any thing was in fact due. To those freighters, then, the plaintiffs ought to resort. They knew that the master of the ship, who was the agent of the defendants, received at *Antigua* half the proceeds of the cargo. They might naturally have concluded that he had brought the avails home with him, and that if they had a right to any freight, they had a lien for it upon this money. They ought, as possessing common vigilance, to have inquired how the facts were. They neglected this, and when the defendants had received their indemnity pursuant to the award of arbitrators, they remitted the money, which the plaintiffs had neglected even to inquire for, to the owners of the cargo. — These facts give the plaintiffs no right to demand repayment of what they fairly paid the defendants, either with a

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full knowledge of the facts, or the means of arriving at such knowledge.

Dexter and *Jackson*. If the plaintiffs had known the defendants to have had this money in possession, they would certainly never have paid their demand of a total loss, without deducting what they had previously received from the freighters. They would have told them to retain it to their own use, at least until *Pollard & Co.* had come here and entitled themselves to it by our own laws, which we say would never have been the event. Had they hesitated, the plaintiffs would certainly have engaged to indemnify them.

The verdict establishes the fact, that the plaintiffs were ignorant of the defendants' holding this sum. The suppression of such a fact was a fraud upon the plaintiffs, not morally so, or with a fraudulent intent on the part of the defendants; but sufficient to vitiate the award of the arbitrators, and all the proceedings under it.

The payment over of this sum to *Pollard & Co.* by the defendants was made in their own wrong. It was never demanded of them, nor would it probably ever have [* 407] been demanded of them. It was not due to them by the *English* law.

Neither does a parole submission and award, as this was, vary the rights of the parties. It is very distinct in its nature and effects from a judgment of the court; being more like an adjustment or an agreement to settle according to the opinion of those arbitrators; an agreement to pay, and a consequent payment; which being made under a gross mistake of essential facts, the money is properly recoverable in this equitable action.

The money was in the hands of the defendants, in the nature of salvage, and as such they were bound to deduct it out of their claim for a total loss; instead of which they concealed the fact from the underwriters, put the amount of a total loss in their pockets, and then remitted the money to the freighters, from whom they had, on every principle, a right to retain it.

Otis, in closing the argument, contended for a new trial, not so much on the ground of misdirection, as that the verdict was contrary to the legal effect of the whole evidence. Here was no concealment. The plaintiffs knew from the decree of condemnation, which must have been shown them, that the proceeds of the cargo were paid to the master. The defendants were under no obligation to show what appropriation had been made of those proceeds, unless particularly questioned. The plaintiffs, making no inquiry, must be presumed to have known the whole fact, or to have waived their right to such knowledge. — By the abandonment the

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defendants put the plaintiffs in their own place; but they were not obliged to pay this money to them. If they had so paid it, they must still have been answerable for it to the freighters, and they were not bound to depend on an indemnification from the plaintiffs for neglecting what was their duty to do as upright merchants.

The action was continued to this term for advisement; and now the opinion of the Court was delivered as follows, by

[* 408] *SEDGWICK, J. In the year 1800, the defendants insured, at the office of the plaintiffs, 5000 dollars on the freight of their ship *Columbia*, in her voyage from *Teneriffe* to *Jamaica*. The ship was laden with wine, the property of Mess. *Pollard & Co.*, a commercial house in *London*. On her voyage she was captured by a *French* privateer, and kept in possession more than ninety-six hours; after which she was recaptured by a *British* cruiser, carried into *Antigua*, where she was libelled, and ordered to be sold; one half of the gross proceeds to be paid to the recaptors for salvage; and the other half, after deducting all expenses, to be paid to the master, for the use of all concerned.

The defendants claimed against the plaintiffs a total loss. This claim was resisted by the plaintiffs, who contended that inasmuch as the goods were transported part of the way towards *Jamaica*, and were disposed of at *Antigua*, for the benefit of the shippers, freight was earned for so much, *pro ratâ itineris*; and that, for that portion of the freight, the defendants ought to look to the shippers, and not to the plaintiffs, the underwriters.

The question of difference between the parties, that is, "whether all or what proportion of the freight was due from the company, the plaintiffs, or from Mess. *Pollard & Co.*, the freighters in *London*," was by mutual agreement submitted to two respectable merchants, as arbitrators, who determined that the plaintiffs were "answerable for a total loss." To this award the plaintiffs submitted, and paid the defendants accordingly.

Now, it is most manifest, were there nothing more in the case, that this transaction would be conclusive between the parties, equally whether the award was or was not founded on just and correct principles; provided there was not (and in this case it is not pretended that there was) any fraud. It would indeed be a monstrous solecism, that a payment made in pursuance of a fair award should be set aside, and the transactions on which it was founded overhauled in a court of justice.

[* 409] * It only then remains to be determined, whether there be any facts, in this case, which will make it an exception; and will authorize the plaintiffs to recover back part of the money paid, although it was paid in pursuance of an award

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The master paid to Mr. *Colquhan*, the friend and correspondent of Mess. *Pollard & Co.*, that part of the proceeds of the sale which he received, except the sum of 521*l.* 19*s.* 5*d.* sterling, which he retained, and paid over in a bill of exchange to the defendants, as the freight *pro ratâ itineris*, in case they should be entitled to such; but otherwise to be remitted to Mess. *Pollard & Co.*; the master being ignorant, as he stated, whether freight was due or not, or whether that sum was due, if any.

From the report of the judge it appears that, although the above-mentioned sum of money was in the hands of the defendants at the time of the hearing before the arbitrators, yet no information was given to them of that fact; and the plaintiffs say that this was such a concealment as renders the defendants liable in this action.

It is in general true, that whenever, in an intercourse between two relative to property, one conceals a *material fact*, which he alone has had the means of knowing, and which he is bound in conscience to disclose, and such concealment occasions a loss or injury to the other party, he is entitled to recover an indemnity. — Was then the fact, that the defendants had in their hands a sum of money, under the circumstances which have been stated, a fact *material* to be disclosed to the arbitrators? — If it was, I am ready to admit that the defendants ought in conscience to have disclosed it.

The subject submitted to the arbitrators was the abstract question, "whether all, or what proportion of freight was due from the company, or from the freighters." The arbitrators determined that the whole was due from the company. Now, that determination was equally true and *just, whether money [*410] was or was not in the hands of the defendants, which, in case of another determination of the arbitrators, might have been retained in part payment of the freight. And it is inconceivable that a knowledge, by the arbitrators, of the fact not disclosed, should have made a difference in the award. It is put to the arbitrators solemnly to determine a question in controversy between the parties, and they, as honorable, honest, and intelligent men, say the whole freight is due from the plaintiffs; and that declaration is equally true, whether the defendants had or had not any money of *Pollard & Co.* in their hands; or whether they had or had not any means of obtaining satisfaction from them. The disclosure, then, of the fact said to have been concealed, ought not to have had, nor could it have had, any effect in producing a different result from the arbitrators; and it is not pretended that there was any other important or useful purpose, for which it ought to have been revealed. It may be added, that there is no motive suggested, that could have

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induced the defendants to a fraudulent or improper concealment; and they, as soon as it was determined that the whole loss fell on the plaintiffs, remitted the money in their hands to Mess. *Pollard & Co.*, to whom it of course belonged.

On the whole, we are satisfied, that the fact not disclosed was not a material fact to be known to the arbitrators; and as the verdict was found upon the belief that it was so, we think it ought to be set aside, and a new trial granted.

We do not mean to suggest an opinion, that the award of the arbitrators was founded on legal principles, nor of course that the plaintiffs have not a legal claim against the freighters, for the money they have received; — but only that the defendants were justified in remitting it after the award was made.

New trial ordered.

[*411]

*GILLAM TAYLOR *versus* DAVID TOWNSEND

A mortgagee, after a recovery on a bill in equity by the mortgagor to redeem, and before possession taken under the judgment, may lawfully take down and carry away any buildings erected by him on the land mortgaged, the materials of which were his own, and not so connected with the soil, as that they cannot be removed without prejudice to it.

When land of a debtor is set off on execution, to which no access can be had, but over other lands of the debtor, the sheriff and appraisers may set off to the creditor a right of passage over such other lands, either separately or jointly with the debtor.

THIS action was trespass. The declaration contained two counts. The first was for breaking and entering the plaintiff's close in *Boston*, pulling down, destroying, and carrying away two wooden buildings; the second count was for breaking down the plaintiff's fence. The action was tried upon the general issue, before *Parker*, J., November term, 1810, and a verdict taken for the plantiff, subject to the opinion of the Court upon the following facts reported by the judge who sat at the trial.

On the day mentioned in the first count of the plaintiff's declaration, the defendant was in possession of the *locus in quo*, under a deed from one *Weld*, who had a deed of the same from the plaintiff, *Taylor*, but had given a certain bond of defeasance, which is described in the bill in equity, heretofore prosecuted by *Taylor* against the said *Weld* and the present defendant, which process is referred to for the consideration of the Court in this case. (1)

(1) See 5 *Mass. Rep.* 169.

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During the defendant's possession under said deeds, he being the owner of the residue of the estate formerly *Taylor's*, and described in the said bill in equity, by purchase of sundry creditors, who had extended executions on the same, he erected thereon the buildings mentioned in the declaration; the part of the said buildings, which were taken down by him, extending over the land which was claimed in equity, and finally recovered by the plaintiff. One of these buildings was a barn, and the other was a shed used as a blacksmith's shop. There was no cellar under either of them, and no injury was done to the soil, other than what may have arisen from taking up two or three posts, on which the end of the barn rested.

After judgment was rendered against *Weld* and *Townsend* upon the bill in equity, but before a writ of possession was issued thereon, and before any entry of *Taylor* under the judgment, the defendant took down the parts of the several buildings, which projected over the land recovered *against him; and this [*412] is the trespass complained of in the first count.

The plaintiff proved his second count, by showing that a fence, which he had erected across part of the premises, which he had recovered upon his bill in equity, and of which he had been put in possession by the writ of possession which issued on that process, had been thrown down by *Townsend*.

The defence on this count was, that in the levying of the execution of *Callahan* vs. *Taylor*, and other executions against *Taylor*, the place where the fence stood was reserved and set off by the appraisers, as a passage-way for the accommodation of the creditors in said executions; and that the defendant, who is the assignee of all those creditors, claiming a right to said passage-way, took down the fence, which had been erected across the same by the plaintiff, for the purpose of obstructing said passage-way.

If the Court should be of opinion, upon the first count, that the defendant had not a lawful right to take down the buildings, under the circumstances before stated; and that, on the second count, the appraisers could not lawfully give an easement, or right of passage-way, over the land of *Taylor*, to the creditors who extended their executions on other of his land, then judgment was to be entered on the verdict. — But if on both counts the defence above stated should, in the opinion of the Court, be sufficient, the verdict was to be set aside, and the plaintiff to become nonsuit. And the verdict was to be so amended, as to suit either of the counts, on which the Court might determine that the plaintiff was entitled to judgment.

The action stood over upon the report of the judge to the last March term in this county, when it was argued by *Whitman* for the plaintiff, and *Townsend* for the defendant.

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Townsend, as to the first count, insisted that the defendant was lawfully in possession of the *locus in quo*, until the plaintiff
[* 413] executed his writ of *habere facias* under his process * in equity. Being so in possession, he was not liable to an action of trespass *vi et armis*.

As to the second count, he said it would be futile, and a mockery of justice, to satisfy an execution by levying it on real estate, to which the creditor was to have no lawful access. The statute of 1783, *c.* 57, § 2, gives to the creditor in such case all the title which the debtor had in the land set off on execution. This, one would naturally suppose, included a right to get at the land over other land of the debtor. If no passage-way had been set off by the sheriff and appraisers, yet the law in this case would have given the creditors a right of way from necessity; since the land was all at a distance from the street. Though authority to this purpose is not expressly given by the statute to appraisers, yet unless they have it by implication, the statute must in many cases be perfectly nugatory and inoperative; and the law will imply what is necessary to give operation to so essential a statute as this for levying executions on lands of debtors. It may be added that the debtor has by law a right to redeem his land, by paying his just debt. If he neglects to do this, he is to be considered as consenting to the correctness of the extent, and then he has no cause of complaint; for *volenti non fit injuria*.

Whitman, upon the first count, contended that the plaintiff, from the time of the rendition of judgment for possession, was in contemplation of law in full seisin and possession of the land recovered; so that he might maintain tresspass against any one, not excepting the tenant, who from that time wrongfully kept possession, for any forcible injury done the land. It was said by *Sedgwick*, J., in delivering the opinion of the Court in the case of *M'Neil* vs. *Bright & Al.*, (2) "That a man, who has a judgment for possession, may enter without a writ, is common learning, and indeed is not denied. And why should the commonwealth, which cannot be disseised, the whole people, require the aid of an officer to give them
[* 414] actual possession, * when it is not necessary in the case of an individual? The highest evidence of title, that can exist, is the solemn judgment of a court. When this judgment says that the demanded premises, which were the property of *A. M.*, have been forfeited by him, and have escheated, enured and accrued to the government, if this be not evidence that his title was transferred to the government, we must abandon the idea of the absolute

(2) 4 *Mass. Rep.* 300.

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verity of judgments." — If a recoveror dies after judgment, and before his writ of seisin is executed, his heirs are not disseised by the continuance of the tenant on the land. The plaintiff had sufficient possession under his judgment to entitle him to his action of trespass for the wrong done him.

That the defendant, in taking away the buildings mentioned in the declaration, did a wrong to the plaintiff, is proved by the recovery itself. The defendant had wrongfully kept possession from the plaintiff. By the adjustment made in the equitable proceedings the defendant had been allowed the expense of erecting these buildings, and by taking them away afterwards, he has received that allowance for no consideration at all. In other words, he has the value of the buildings, and also the buildings themselves. But allowing he might take away buildings erected by himself, there is no pretence that in doing this he had a right to subvert the soil itself. It was his folly so to connect the buildings with the land, that he could not remove them, without committing a trespass.

Upon the question arising on the second count, the statute of 1783, *c.* 57, under which alone real estate may be taken in execution, expressly directs that the officer shall set out the estate by metes and bounds. If the law would give the creditor the privilege of a way as a necessary easement, this does not answer the objection, for it does not prove the authority of the sheriff or the appraisers to set it off. They may give a much greater easement than the law would deem necessary. But it was the creditor's folly to extend on land, to which he could have no access.

* It may be, and probably it generally is, done with a view [*415] to make the extent as inconvenient as possible to the debtor, and thus compel him to sell the remainder under its value.

The action was continued for advisement after the argument, and at this term the judgment of the Court was pronounced by

PARKER, J. This action stood over from the last law term in this county, not on account of any difficulty in deciding it, but because the whole time of the Court was occupied in a multitude of more important questions, which were then before them.

We are of opinion that, upon the facts reported, the action, as far as it respects the first count, is not maintained. It is well settled that none can maintain an action of trespass *quare clausum fregit*, but he who has possession in fact of the land. Thus one who is disseised can maintain trespass for no act subsequent to that which ousted him from the premises, until he reënters, and then he may sue for all the intermediate acts of trespass. (3) Thus also one

(3) *Com. Dig. Trespass*, B. C.

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who has leased his lands for years, or even at will, cannot maintain *trespass* against a stranger, for any injury to the possession, while in the actual occupation of his tenant. (4) (*a*)

Now in the case at bar, *Townsend* was not only in possession, but was *lawfully* so, and that under the plaintiff himself, until the judgment of the Court against him. And when the act complained of was done, he had not been amoved, nor had he released, or otherwise surrendered his possession. It is impossible therefore to consider him a trespasser; and if the act done by him was wrongful, the proper remedy is by action in the nature of waste, considering him a tenant at will after the rendition of the judgment, for an injury done to the reversion.

But we apprehend there is another good ground of defence on the facts reported; and that is, that until an execution [* 416] of the decree of the Court, he had a right to take * down and carry away any buildings erected by him, the materials of which were his own, which were not properly fixtures, or so connected with the soil as that they could not be removed without prejudice to it.

However rigidly the rights of landlords against their tenants may have been construed in ancient times, it is now settled, that in favor of trade, manufactures, and business, buildings erected for those objects may be carried away by those, whose estate is determined; (5) and Lord *Mansfield*, in the case of *Lawton* vs. *Salmon*, (6) adopts the common sense doctrine, that improvements made by the tenant during his term may be removed by him, if he does not thereby prejudice the estate of his landlord. It is enough for the tenant to say, "I leave you the land as I found it." — If this doctrine is advanced in the case of a tenant, who either knows the duration of his own term, or, if a tenant at will, who can abandon the soil when he chooses, and therefore may be said to incur expense by erecting buildings, &c., in his own wrong, *a fortiori*, it ought to apply to one who has held the estate for many years under a conveyance from the owner, without any expectation that his estate would be defeated by the performance of a condition attached to it; which was the case of the present defendant. — On the first count, therefore, we decide that the defendant is not liable. (*b*)

On the second count, the facts to be considered are these: — that *Townsend* held a tenement under certain executions against *Taylor*,

(4) 1 *Johns. Rep.* 511, where the cases to this point are cited.
(*a*) [See *note* to *Starr & Al.* vs. *Jackson*, 11 *Mass. Rep.* 527. — ED.]
(5) *Bull, N. P* 34. (6) 1 *H. Black.* 259, *in notes.*
(*b*) [Vide *Gaffield* vs. *Hapgood*, 17 *Pick.* 192, and cases cited in the argument. — ED.]

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which had been regularly obtained on judgments recovered by certain of his creditors, and been duly levied on the tenements, which were afterwards legally transferred to *Townsend*. The fence taken down by *Townsend*, which is the act complained of in the second count, was placed by *Taylor* across a certain part of his land, over which the appraisers had, by the return of their doings in levying the executions, given a right of way to the several creditors, whose executions had been satisfied out of the tenements.

*The action is brought for the destruction of this [* 417] fence, upon the idea that nothing can be transferred to creditors, of the debtor's real estate, by the levy of executions, except what is and can be described by metes and bounds, and that the appraisers are not authorized by law to set off an easement, or mere right of passage, and that the creditor can make no title under such levy.

It is certain there is no express authority given by the statute to the sheriff, to cause a mere easement or right of passage to be set off in satisfaction of an execution; nor would a levy upon such an incorporeal right be good, standing by itself; for it is nothing, except in relation to some actual, corporeal property, of which it is a mere incident or quality.

But we are all of opinion, that the power of separating to the creditor's use, or giving to him, in common with the debtor, the right of passing over land of the debtor not set off, in order that he may have access to the other land of the debtor which is set off, is essential to the execution of the statute, according to the intention of the legislature. Cases may often occur, in which, if this power does not exist, the estate levied on may be of no value to the creditor; unless he should have by law a way of necessity over other lands of the debtor; and indeed the very principle, that when a man has no other way from his land to the streets or public ways, he shall have a way over his neighbor's land from necessity, is sufficient to show an authority in the sheriff and appraisers to give such a privilege, as appurtenant to the land they may set off.

It may be for the convenience of a debtor, that the back part of his land and tenements be set off to his creditor, leaving him the front, in which he may continue to carry on his business. Now, to refuse to the sheriff and appraisers the power to give a right of passage over land occupied as a yard by the debtor, would be to oblige creditors in all cases to levy upon that part of the debtor's real estate, *the loss of which would most injure [* 418] him; and perhaps in most instances would deprive him of the power of redeeming.

It sometimes happens that the chambers of a house are sufficient

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to satisfy an execution, sometimes the lower rooms and cellar; now, it is absurd to suppose that these may be taken and set off to the creditor, and yet that no passage through the entry and staircase can be given. The power of setting off the estate comprehends the power of giving access to it; for without the latter the former could not be used, and so could not be a subject of appraisement, being of no value.

Undoubtedly the appraisers should consult the interest of the debtor, in establishing the right of ingress and egress to and from his land set off to his creditor, and should confine themselves to what may be necessary for the use and occupation of the property; and whenever they do find it necessary to give such a privilege, if it should be inconvenient to the debtor, his inducement to discharge his debt, and relieve his land, will be increased.

We are all of opinion, that upon this count also the plaintiff has failed, and that the verdict must be set aside.

Plaintiff nonsuit.

JOHN HOLLAND *versus* ROYAL MAKEPEACE.

Set-offs under our statutes are confined to transactions between the parties in the suit; therefore, in an action brought on a check, which had been assigned to the plaintiff, the defendant was not allowed to set off a negotiable note made by the drawer of the check and endorsed to the defendant.

THE plaintiff declares in case, for that the said *Makepeace*, at, &c., on the 9th day of December, 1807, made his certain order in writing for the payment of money, commonly called a check, therein and thereby requesting and directing the cashier of the *Massachusetts Bank* to pay to one *John Coates*, or bearer, 1000 dollars on his account; and the said *Coates* thereafterwards on the same day assigned and delivered the said check to the plaintiff, who thereby became, and still is, the lawful bearer thereof, and entitled to the payment of the sum of money therein specified; and the plaintiff avers that the said cheek was on the same day presented for payment, which was refused, of which the said *Makepeace* [* 419] thereafterwards on the same * day had notice, and thereby became liable, and in consideration thereof promised the plaintiff, &c.

There is a similar count upon another check drawn by *Makepeace*, Sept. 23d, 1807, in favor of *Coates*, for the sum of 293 dollars

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60 cents. — And a third count for 1600 dollars, money had and received.

The defendant having suffered a default, the parties afterwards entered into the following agreement: —

"It is agreed that the checks declared on were held by, and were the property of *John Coates*, in whose favor the same were drawn, from the day of the date thereof until the first day of October, 1809, when he delivered the same, with other property, to the plaintiff, who was one of the trustees, to whom the said checks were assigned on that day to the use of himself and certain other creditors of said *Coates*; that said *Makepeace* purchased said *Coates's* negotiable promissory note, which is filed in this action, and had the same duly endorsed and delivered to him on the 16th day of September, 1809, which was after said *Coates* had failed.

"And the parties further agree, that if the Court shall be of opinion, upon these facts, that said note, or the money paid therefor by said *Makepeace*, could by law have been given in evidence by him in the trial of this action, as an offset or payment of the plaintiff's demand, the default shall be taken off, and the action stand open for trial; otherwise judgment to be rendered for the plaintiff."

An argument was had at the last March term in this county by *Jackson* and *Dutton* for the plaintiff, and *Prescott* for the defendant; after which the action stood continued for advisement; and at this term the opinion of the Court was delivered by

SEDGWICK, J. On the 23d of September, 1807, the defendant drew a check in favor of *John Coates* for 293 dollars 60 cents; and on the 9th of December following, another check in his favor for 1000 dollars. These remained in the hands of *Coates* until the first of October, * 1809, when he delivered them, with [* **420**] other property, to the plaintiff, who was a trustee with others of *Coates's* creditors, for their general benefit. On these checks the action is brought.

Previous to the assignment of the checks, *viz.*, on the 16th of September, 1809, the defendant purchased the note, which is filed in the case, which was then duly endorsed and delivered to him, and which is of greater amount than both the checks, on which the action is brought; and the question is, whether by law the note can be set off against the checks. — This must depend on a construction of the statutes, because a set-off, in favor of a defendant, for an existing cause of action, against a plaintiff's action, is unknown to the common law.

Were it permitted me to suggest my own wishes upon this subject, I should not hesitate to say that it is desirable that the wisdom

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of the legislature should establish a more extensive system of set-off. Such has been the case in *England*, and it has been found greatly beneficial, and from the nature of the thing it must be so, because the necessary consequence is, to diminish the number of actions. The inquiry, however, is, whether the system which has been adopted will comprehend the set-off claimed by the defendant in this action.

By the provincial act of 6 *Geo.* 1, *c.* 2, the action, in which there might be a set-off, was either "debt or case for any sum of money due upon contract between the parties, *for any goods sold or services done*, whether the account be open, or a balance thereof be made and signed by the parties; except specialties and express contracts in writing." And the act provides that, in such case, the defendant may give in evidence what is *due upon his books*, by way of balance to the plaintiff's demand. Here the actions, in which a set-off is authorized, are only such as are brought for *goods sold* or for *services done*; and the claim for a set-off is confined to what is due to the defendant *upon his books*; which, by a reasona-
[* 421] ble construction, *can, I think, only comprehend the same kind of demands as those on which the action is brought, *viz.*, *goods sold and services done.*

By the statute of 1784, *c.* 28, § 12, it is enacted, "that when an action shall be brought to recover a debt due *on book account stated by the parties*, a quantum meruit, quantum valebant, *or for services done upon an agreed price*, the defendant may file any *account* he hath, in the clerk's office seven days before the sitting of the court," &c., "and give the same in evidence against the plaintiff's demand."

It is certain, that the actions, against which there may be a set-off by this statute, do not comprehend the one now under consideration. This is an action brought upon checks given by the defendant; those enumerated in the statute are actions "on book account, an account stated by the parties, *quantum meruit*, *quantum valebant*, or for services done upon an agreed price."

Nor is the claim on the part of the defendant such a one as is authorized to be set off, by virtue either of this statute or of the provincial act. In the same section of the statute of 1784, which has been cited, it is provided that, "if upon the trial it shall appear that there is a balance due to the defendant, he shall recover the same, in the same manner as if he had brought his action therefor." This provision is universal, and to extend to all cases where there is a claim of set-off authorized by the statute; but it cannot have been the intention of the statute, that where one man had purchased the negotiable paper of another, he should be

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holden to pay any balance which was due to the man against whom he purchased it, from the man of whom he purchased it.

By the statute of 1793, *c.* 75, § 4, it is enacted that "in any action brought, or which shall be brought, for any debt *upon simple contract or promise in writing*, not under seal, the defendant therein may give in evidence, upon the general issue, his or her demands against the plaintiff * for goods delivered, [* 422] *money paid*, or services done, whereof an account shall be duly filed in the clerk's office of the court whereto such action shall be brought." That this is an action brought on "simple contract, and promise in writing not under seal," is true; and it therefore authorizes a set-off in the instances specified in the statute. And the only question is, whether the note, filed by the defendant in this case, is such a demand in favor of the defendant, as, in the contemplation of the statute, is a subject of set-off.

We have none of us any doubt that the point urged by the counsel for the defendant, that a negotiable security, assigned after it has become due, is subject to all the equitable considerations in the hands of the assignee, that it would be in the hands of the original owner of it, is as a general principle correct; nor are we disposed to deny the position, that the defendant might recover the amount of the note assigned to him, in an action against *Coates*, upon a count for money *paid*, laid out, and expended. But we think that, by a just construction of the statute, the subjects of set-offs are confined to transactions between the parties in the suit. (*c*)

When it is said, that the assignment of a negotiable security over due shall not deprive a defendant of any considerations, which might have been favorable to him, if the action had been brought by the original holder, it is meant that such facts, as would show that the security, at the time of the assignment, had become in valid in the hands of the original holder, should equally avail the defendant against the assignee. But it never could have been intended by the statute, that an assignee should be bound to contest a demand, made by the defendant against his assignor, on a negotiable security, which the defendant might have purchased. This might, in many instances, enable a defendant, by collusion with the assignor, to defeat the effect of an assignment; because the assignee, being a stranger to the transaction * relied [* 423] upon in the defence, could have no means of protecting himself. And it would be glaringly unjust, in this case, to authorize the set-off, because it would enable the defendant, according to

(*c*) [*Peabody* vs. *Peters & Al.* 5 *Pick.* 3. — And see *note* to *Clark* vs. *Leach*, 10 *Mass. Rep.* 55 — But see *Sargent & Al.* vs. *Southgate*, 5 *Pick.* 316. — *Braynard* vs *Fisher*, 6 *Pick* 355. — ED.]

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the facts stated in the case, to recover a balance against the plaintiff; for the statutes which have been mentioned, being made *in pari materie*, must be construed together, as if they were but one act; and the consequence is, that as there would be a balance due to the defendant, if the note were allowed as a set-off, he would recover the same, in the same manner as if he had brought his action therefor. I will only add that this, to my mind, is conclusive to show that this case is not within the statute.

The consequence of this opinion is, that the default must stand, and judgment be rendered thereon for the plaintiff.

NATHANIEL CALL *vs.* BENJAMIN H. HAGGER AND OTHERS.

In an action against six several obligors, service was on five only, and as to the sixth, the officer certified that he had no last and usual place of abode in his county: the defendants, on whom service had been made, moved that the proceedings should be stayed for want of service on the sixth, whom they suggested to be an inhabitant of the commonwealth, and within the reach of process. The motion was overruled, and the action proceeded against the five who had been served with process.

The statute of 1809, *c.* 33, § 2, by which suits on bonds given for the liberty of the prison-yard are limited to a year after the breach, does not apply to actions for breaches committed before the passage of the act.

DEBT on bond, dated Sept. 27, 1805, against six obligors, five of whom are named of towns in the county of *Middlesex*, whereof one is called a deputy sheriff, and the sixth is named of *Boston*, in the county of *Suffolk*. The coroner of *Middlesex* returned a service on four; a deputy sheriff of *Suffolk* returned a service on a fifth; and respecting the sixth, there was no return of a service on him, but the coroner certified respecting him, that he had no last usual place of abode in his county. The writ was dated the 8th of December, 1809.

At the Common Pleas, the defendants, on whom the process had been served, appeared and moved that the action should be dismissed, "for want of legal service, inasmuch as there is [* 424] no service on *E. H.*, one of the joint obligors in * the bond declared on, he being at the time, and ever before, an inhabitant of this commonwealth."

This motion was overruled in the court below; and the action being brought here by appeal, the motion was renewed in this Court.

Rockwood, in support of the motion, suggested that this case did

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not come within the decision in *Tappan* vs. *Bruen*, (1) for there the defendant, on whom no service was made, had no domicil within the commonwealth; whereas the party in this case is averred always to have been an inhabitant.

Aylwin for the plaintiff. Every thing has been done, which could be required of the plaintiff, to bring himself rightly in Court. If the defendants will not plead in abatement, and show in what part of the commonwealth the other defendant resides, it must be considered as a waiver of the objection. In *England* a defendant not served with process must be outlawed, before the plaintiff can proceed against the others. (2) Here, as there is no process of outlawry in civil actions, unless a return of *non est inventus* shall be deemed an equivalent, judgment can never be obtained against parties to join contracts, where one of them chooses to elude the process of the Court by flying from county to county. But the case of *Tappan* vs. *Bruen* is in point to support the present course of proceeding, which has always prevailed in this common wealth.†

* *By the Court.* This return must be sufficient; or [* **425**] there must be required a return from the sheriff of every county in the commonwealth, certifying that the party has no domicil within his county. This would be an insufferable inconvenience. The motion is overruled, and the action must proceed.

After this decision, the action was referred to the decision of the Court on the following agreed statement of facts: —

The said *Hagger*, being a prisoner, in execution at the suit of the plaintiff, in the jail at *Concord*, in the county of *Middlesex*, sealed and delivered, with the other defendants, the bond declared on, conditioned to be void, if the said *Hagger* should thenceforth continue a true prisoner, &c., without committing any manner of escape. But the penalty of the bond was not precisely double the sum for which *Hagger* stood committed by virtue of said execution

(1) 5 *Mass. Rep.* 193. (2) 1 *Strange*, 473.

† *Aylwin* cited the case of *Russell & Al.* vs. *Allen & Al.*, decided in this Court, August term, 1787. Present, *Cushing*, C. J., *Sargeant*, *Sewall*, and *Sumner*, justices. Case for goods sold and delivered to the defendants, who were partners. The writ was served on *Allen* only, without taking notice of the other defendant. *Allen* pleaded the general issue, which was joined. — *Sullivan* excepted to the declaration against the defendants jointly, as the service was on one of them only. If a joint promise were proved, he said, it would not maintain the action, which was then substantially against one defendant, for one only was then in Court — *Lowell*. The exception should have been taken in abatement. It cannot prevail now that the general issue is pleaded and joined; and he cited the case of *Rice* vs. *Shute*, 5 *Burr.* 2611.

Cushing, C. J. In an action against two on a joint bond, and one defendant only served with process, the action proceeds against him; and this has been often practised n this government. To which the other justices agreed; and also that the exception in this case came too late.

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He continued a true prisoner, until the 15th day of October, 1807, when he entered voluntarily, in the night time, into a tavern, which stood on land belonging to the county, and on the same lot on which the jail stood, and within one rod thereof, and within the limits assigned for the jail-yard. The said tavern was the house in which prisoners, who had given bond for the liberty of the yard, had, from the erection of the jail, always been accustomed to sleep in the night time; but it had never been assigned by the Court of Sessions for that purpose, agreeably to the provision of the statute on that subject. The said prisoners had always been informed by the sheriff of said county and his deputy jailer, that the said tavern was the proper lodging house for them in the night time.

But the plaintiff had no knowledge of the said *Hagger's* so being in the night time in said tavern, until within one year next preceding the commencement of this action, which was more than a year after the supposed breach of the condition.

[* 426] * If the Court should be of opinion, that the plaintiff would be allowed to give evidence of the facts aforementioned, as proof of an escape, and that they would maintain his action, the defendants agreed to be defaulted, and that such judgment should be rendered against them as to the Court should seem proper. But if the Court should be of opinion, that the plaintiff could not maintain this suit, then he agreed to become nonsuit, and that judgment should be rendered for the defendants for their costs.

The cause was argued on these facts by *Davis* [*Solicitor General*] and *Aylwin* for the plaintiff, and *Hoare* for the defendants.

Hoare contended that here was no escape. The prisoner was placed in this house by the sheriff, in whose custody he was. If it was not part of the prison, the sheriff is answerable, and not the innocent prisoner, who was under a moral impossibility of avoiding the act relied on as evidence of an escape. In the case of *Baxter* vs. *Taber*, (1) the Court laid down this principle, which is certainly founded in the highest reason, "that to constitute an escape within the intent of the bond, there must be some *agency* of the debtor employed;" and they add that there must be *consent* on his part, otherwise there is no escape. Here was certainly neither agency nor consent on the part of *Hagger*. The whole fault, if any fault there was, is attributable to the sheriff alone.

If it be said that it was the prisoner's duty to go to the records of the Sessions, and there ascertain the limits of the prison-yard, and the buildings into which he was privileged to go, it may be answered, that as a stranger to the place he could not locate the

(1) 4 *Mass. Rep.* 369.

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boundaries, nor could he know the buildings merely from the description of them in the record. For this he must depend on the information of others. Had he trusted to bystanders, he might justly be charged with culpable negligence; but when he received positive and precise instructions from the sheriff himself, surely he did all that the most scrupulous caution *could [* 427] dictate; and if he is in such case chargeable with an escape, nothing short of inspiration could have preserved him from committing it.

In *England*, the sheriff is not chargeable with an escape, unless fraud or negligence appear; and a recapture purges the escape. There can be no reason why the same principles should not govern here; or why the law should be more severe with sureties in a case like this, than against the sheriff in *England*.

If it be once established, that the sheriff's directions on this point are no protection to a prisoner, a door will be opened for gross collusion between creditors and sheriffs. And it will always be out of the debtor's power to prove such collusion.

By the statute of 1808, *c.* 92, it is enacted, that no prisoner having given bond, &c., shall be considered as having committed an escape in consequence of having entered upon any private estate or any public building within the limits; with an exception only of suits wherein final judgment had, before the passing of the act, been rendered by this Court. The house in which *Hagger* was must be either private property or a public building; and in either case he is not chargeable with an escape. A provision of the like kind is contained in the statute of 1811, *c.* 85, § 1, without an exception even of suits, in which final judgment has been rendered.

By the statute of 1809, *c.* 33, § 2, it is enacted that no action shall thereafter be maintained for the breach of any bond given or to be given for liberty of the yard, unless such action be brought within one year from and after such breach; with an exception of actions then pending. This provision is very clear and explicit, and the case finds expressly that this action was not commenced within the year from the supposed breach.

For the plaintiff, it was insisted that here was plainly an escape, since the prisoner was in the night time out of any apartments belonging to the prison. As to his being misled *by the sheriff, the case of *Burroughs* vs. *Lowder & Al.*, [* 428] decided the present term, [*ante, page* 372,] is directly in point, to show it no excuse. It is wholly at the prisoner's peril.

The remaining question in the case is, whether the action is barred by the limitation in the statute of 1809, *c.* 33. The breach in this case took place before the passage of this law; and we con-

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tend that the words used do not necessarily extend to suits for breaches previously committed. The future, not the past, is the object of all true legislation. It was truly said by Judge *Patterson* in the case of *Calder & Ux.* vs. *Bull & Ux.*, (2) that *retrospective laws of every description neither accord with sound legislation, nor the fundamental principles of the social compact;* and this Court will not incline, by an enlarged exposition of the law in question, to give it a retrospective operation, but, if possible, will give it such a construction as will avoid imputing injustice to the legislature. For it would be manifestly unjust to deprive the plaintiff of a remedy on his bond for an antecedent forfeiture of its condition, especially when he knew not of the breach, nor could expect a future limitation by the legislature. (3) A prospective construction appears better to conform to the intention of the act; and its true reading should be, that no action shall *hereafter* be maintained for any *future* breach, unless, &c.

If, however, the Court should not adopt this construction, we contend that the act is unconstitutional, as impairing the obligation of an existing contract, and therefore void. The obligation of this contract was, that *Hagger* should continue a true prisoner, &c., and in default thereof, that the defendants would pay the penalty of the bond. This obligation they voluntarily imposed on themselves.

To *impair* is to *lessen*, to *diminish*, or to *injure*. A law which takes away all remedy on a contract, or circumscribes the time within which it shall be enforced, may certainly be said [* 429] to lessen or injure such contract. If the * legislature are not restrained by the constitution from circumscribing the time in which a remedy shall be sought on an existing obligation, they may, under that form, take away the remedy altogether, by restricting the time to a single day. Such could never have been the intention of the framers of the constitution.

Hoare, in reply. In *Burroughs* vs. *Lowder & Al.* there was no such direction of the sheriff as in the case at bar. Here the officer, in whose lawful custody he was, placed the debtor, and expressly directed him to sleep in the apartment, for sleeping in which, it is now attempted to charge him with an escape. Such a case has certainly not yet been decided.

The provision of the statute of 1809 is explicit, and admits of no construction. The restriction in the constitution of the United States, relied on for the defendants, may naturally and equitably be considered as applying only to such contracts on which a consideration has been paid. It is certainly giving it too wide an extent to

(2) 3 *Dallas's Rep.* 397 (3) See *Strange*, 585. — *L. Raym.* 1350.

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apply it to the reasonable limitation of suits approaching so nearly n their nature to an action for a penalty.

By the Court. It is agreed in this case, that the debtor was out of his proper limits as a prisoner. The defence is, that the sheriff deceived him by giving him improper instructions. This cannot avoid the effect of the bond, given voluntarily by the obligors, and placing the debtor's conformity to its condition at his own peril. This circumstance may well bring the case within the provision of the statute of 1810, *c.* 116, that where it shall appear that a debtor, having given bond for the liberty of the yard, shall, through misapprehension of the limits, commit an escape, the court may enter judgment for the plaintiff for the money due on the execution, with costs.

The defendants have relied on another point in this cause, having cited the statute of 1809, *c.* 33, § 2, by which suits on prison bonds are limited to one year after the * breach; [* 430] and it is agreed that this action was not commenced until more than a year from the breach alleged.

The plaintiff objects to this act, as being void by the provision of the federal constitution, which declares that "no state shall pass any *ex post facto* law, or law *impairing the obligation of contracts.*" — If the legislature of any state were to undertake to make a law, preventing the legal remedy upon a contract lawfully made and binding on the party to it, there is no question that such legislature would by such act exceed its legitimate powers. Such an act must necessarily impair the obligation of the contract, within the meaning of the constitution; and the courts of law would be found, therefore, to consider it as a void act of legislation, and as having no force or authority. But to extend this principle to acts for the limitation of suits at law, which, when enacted with a due discretion, and a reasonable time allowed for the commencement of suits on existing demands, are wholesome and useful regulations, would be extravagant. It must be left to the discretion of the legislature to fix the proper limitations. In the case under consideration, the term of a year is not, in our opinion, unreasonably short.

But a true construction of the statute in question will not extend it to actions on bonds, where, the escape having taken place before the passing of the act, a right of action had vested in the creditor. Such being the fact in this case, the plaintiff is entitled to judgment; and by the agreement of the parties the defendants must be called.

Defendants defaulted.

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* CHARLES STORER *versus* JOSEPH BATSON.

A, for a consideration paid by *B*, conveys land to *C*, in fee; whereupon *C* executes a bond to *B*, conditioned that he will convey the land to any person whom *B* shall appoint. — It was holden that no estate in the land vested in *B*.

ENTRY SUR DISSEISIN. The demandant counts upon his own seisin within thirty years, and upon a disseisin done by the tenant, who pleads the general issue of *nul disseisin*, which is joined by the demandant.

At the trial of this issue before *Parker*, J., November term, 1810, the demandant produced in evidence a judgment recovered by him against one *David Jones*, at the Court of Common Pleas for this county, and an execution, which duly issued thereon within thirty days after the judgment, and which was duly levied on the demanded premises March 5th, 1799, the same having been attached on the original writ August 2d, 1798, and possession delivered by the officer to the demandant.

The demandant further proved that, in May, 1798, one *Michael Williams*, being seised in fee of the demanded premises, in pursuance of a verbal contract made with said *Jones*, by his deed of bargain and sale, conveyed the same to one *George French* and his heirs and assigns, the consideration expressed in the deed having been paid by said *Jones*; and that said *French* on the same day executed a bond, in the penalty of 1000 dollars, the condition of which was, that he should convey the bargained premises to any person whom the said *Jones* should appoint.

George French, who was sworn as a witness, testified that he acted in this affair as the friend of *Jones*, and at his request, *Jones* being an alien, not entitled to hold real estate in this common wealth; and that he, *French*, had no interest in the demanded premises. The same facts also were sworn to by *French*, in his answers to interrogatories on a process, in which he had been summoned as the trustee of *Jones*, but discharged by the Court of Common Pleas.

In the defence it was shown that, on the 27th of July, 1798, *French* and *Jones* jointly demised the premises to one *Joseph Jewett* for five years, by a lease under their seals, to which *Bat-*
[* 432] *son*, the tenant, was a subscribing witness; * that on the 8th of March, 1799, *Jewett* assigned his interest in the term to *Batson*; and that on the next day *French* executed a deed of release and quitclaim of the premises to said *Batson* and

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his heirs and assigns, under which deed *Batson* entered, and continued in possession until the trial.

It appeared also on the trial, that about the time when the demandant commenced his action against *Jones*, and attached the demanded premises, *Batson* also sued out a writ against said *Jones*, and caused the same premises to be attached as *Jones's* property, and afterwards levied his execution upon a part of the same, but not upon that part which was levied upon by the demandant. There was no evidence of a fraudulent intention in *Jones*, by the conveyance from *Williams* to *French*, to delay or defeat his creditors; but the true object of making the conveyance in this manner was to secure the premises to *Jones*, notwithstanding his being an alien.

If upon these facts the Court should be of opinion that the action could be maintained, it was agreed that judgment should be entered upon the verdict, which was found for the demandant; otherwise he was to become nonsuit, and the tenant allowed his costs.

The cause was argued at the last March term by *L. Richardson* and *Aylwin* for the demandant, and *Amory* and *Thurston* for the tenant.

Aylwin. It is contended for the demandant, that the deed of *Williams* to *French*, and the bond of *French* to *Jones*, amounted to a declaration of a use, upon a bargain and sale, or a covenant to stand seised to the use of *Jones*. The deed and bond are to be taken as one instrument; and coupled with the facts in the case, they show that *Jones* had bargained with *Williams* for the demanded premises, and paid him the consideration money; but *Jones* being an alien, *Williams* at his request grants them to *French* in fee, who thereupon covenants, under a penalty, with *Jones*, that he shall have the possession, receive the * profits, and that [* 433] he, *French*, when required, will make such conveyances of the premises as *Jones* shall appoint.

Independent of the fact of *Jones's* alienage, these words would have constituted a declaration of a use at common law; (1) and since the statute of uses, even the payment of the consideration money by one man, and the taking the conveyance in the name of another, has been decided to create a trust estate by the implication of law. (2) No particular words are necessary to make a covenant to stand seised to uses, though it must be made upon good consideration. Here the consideration money may be considered as paid by *Jones* to *Williams* for *French*; and defective conveyances have been frequently aided by construction. (3)

(1) *Plowd.* 352, *Delamer's case.*
(2) *Barnard*, 384, *Lloyd* vs. *Spillet.* — 2 *Atk.* 150. — 2 *Vent.* 361.
(3) *Shep. Touch.* 82, 83. — 4 *Mass. Rep.* 135.

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The case at bar, besides, shows that *Jones* had the power of appointment. In this view, then, *Jones* may be presumed to have appointed a conveyance to be made to the use of himself; and that a deed was accordingly made by *French*, which has been lost. (4)

Whether sufficiently apt words appear by the report to have been in the condition of the bond, to have made a covenant to stand seised, &c., is immaterial, provided the parole testimony can be admitted to explain the written evidence. That a fact may be averred, though not stated in a deed, appears from a number of authorities. (5) If, however, in *England* these deeds would be considered as creating a *trust* estate, as some chancery cases seem to import, (6) yet we contend that it cannot be so adjudged in this commonwealth, from the more enlarged and beneficial construction, that has always been here given to the statute of uses, and as the words of that statute are sufficiently extensive to embrace the case at bar.

It is not necessary to consider what would have been the situation of the parties, had the tenant been an innocent purchaser without notice; as, on the contrary, the case
[* 434] * shows that he had knowledge of the use, he must stand by the consequences. (7)

If then, as we contend, a use was created, did any personal disability, on the part of *Jones*, prevent the executing of the use in him? — There are some opinions in the books, that an alien cannot be seised of a use. But there is no adjudged case to that effect. The reason given in support of those opinions was, that the remedy of the *cestui que use* lay in chancery; and chancery would not compel the feoffees to execute the use to an alien. But the want of remedy seems a futile reason to be offered against a right; for it had been early determined that an alien could take lands by purchase, although he could not hold them against the king. (8)

It is a fair inference from the preamble to the statute of uses, that aliens could be seised of uses; for it is there recited, that by that species of conveyance the king lost the benefit of escheats of the estates of aliens. And this cannot be doubted, when it is considered that an inquest of office could be enforced against the tenant of the freehold only. The mischiefs of aliens receiving the profits,

(4) 8 *D. & E.* 122. — *Bull. N. P.* 110.
(5) 5 *D. & E.* 129. — 7 *Brown's P. C.* 70. — *Dyer*, 146.
(6) 2 *P. Will.* 314, 415. — 10 *Mod.* 515. — 9 *Mod.* 62.
(7) *Gilbert on Uses*, 7. — 4 *Lord Bacon's Works*, 171.
(8) Vide *Hale's Argument in Collingwood* vs. *Pace*, 1 *Vent.* 417

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and directing the execution of estates by their feoffees, would certainly come within the equity of the statute, were it not within the letter. There is, then, no reason of policy against the executing of a use in an alien, inasmuch as it renders his estate liable to forfeiture and to the payment of his debts; but on the contrary, there is every reason in favor of such a construction.

Argument for the tenant. There are two species of conveyances to uses; one of which operates without transmutation of possession, because the *legal seisin* is effected by the mere operation of law, the second kind operates by means of a transmutation of possession, because the *legal seisin* is first transferred by a common law conveyance, as feoffment, fine, and recovery. (9) — Of the first species is a bargain and sale to uses, in which any words which before the *Stat.* 27 *H.* 8 would have been sufficient, upon valuable * consideration, are still sufficient to raise a use, if it [* 435] appears to have been the intent of the parties to create a use; (10) a second kind of conveyance, operating without transmutation of possession, is a covenant to stand seised to uses, the technical words being "covenant to stand seised to the use of *A*," &c.; (11) and all conveyances to uses should be construed by the rules of the common law, the same technical words being necessary in limitations of uses, as of legal estates.

In this case there are no technical words, which will create a use in *Jones;* and it could not be the intention of the parties to create one; for it could have defeated their object, since an alien cannot take by mere operation of law, for he is incapable of being seised to a use. The statute of uses gave no new rights, but only vested the possession in the *cestui que use.*

Here is no covenant of *French* to stand seised to the use of *Jones;* the bond merely gave the latter a right of action against *French* to recover damages, if he refused to convey pursuant to *Jones's* appointment; it being sufficient for *Jones* to realize the value of the land on *French's* refusal to convey. If a feoffee to uses enfeoffed a stranger without notice, for a valuable consideration, the use was destroyed, and the new feoffee could not be compelled to execute the use. (12)

The conveyance from *Williams* to *French* was absolutely to him, without any use limited to *Jones;* and this latter being an alien, it cannot be supposed that the intention of the parties was to create such a use; nor does the bond, which was to convey to any person *Jones* should appoint, operate to raise a use to him, as the demand-

(9) *Cruise on Uses*, 65, 106, 107. (10) *Cruise*, 66, 67. (11) *Ibid.* 82.
(12) *Cruise*, 19. — 1 *Rep.* 122. — 2 *Black. Comm.* 337.

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ant contends; since there are no technical words for such a purpose; and further, because the only considerations, by which a use can be raised in a covenant to stand seised, are blood or marriage; neither of which existed in this case.

There is no fraud or injury to the creditors of *Jones*, since, if the conveyance had been to him, or to his use, he could not have holden against the commonwealth.

[* 436] * Could *Jones* have taken possession of the land by force of *French's* bond to him? Or would *French* have broken the condition of his bond by refusing to deliver possession to him? The statute of frauds requiring all declarations or creations of trusts, &c., to be in writing, no verbal agreement can operate in deciding this action. — All conveyances must by our statute be recorded; but this bond was not recorded. — *Batson* being a witness to a lease to which *Jones* was a party, by no means amounts to evidence of notice to him; since there is no proof, nor is it to be presumed, that he was acquainted with the nature or subject matter of the instrument, the execution of which he witnessed.

Resulting uses, or uses by implication, can never arise but to the original owner. (13)

But for the bond, there could have been no pretence that the deed of *Williams* was a conveyance to uses, since there is nothing in it to justify such a construction; and since the statute of frauds, no use can be created, but in writing. — The bond, then, is the only evidence the demandant can adduce as evidence of an intention to raise a use. But the bond is not a bargain and sale, nor is it a common law conveyance. If it is a conveyance of any kind, then, it must be a covenant to stand seised to uses. But this it cannot be, both for want of the consideration necessary to such a conveyance, and of the necessary technical words. And upon the whole case it seems very evident, that it was not the intention of the parties to create a use; since the necessary consequence would have been to vest the possession in *Jones* as *cestui que use;* and the situation of the estate would have been precisely the same, as if a direct conveyance had been made of it from *Williams* to him.

L. Richardson observed, that it had always been the manifest desire of the legislature in enacting laws, and of this Court in expounding them, that no debtor be permitted to place his property beyond the reach of his *bonâ fide* creditor; and he contended

[* 437] that if this action could not * be maintained, an ingenious device would be sanctioned, by which a debtor's property could not be reached by any legal process. *French* has already

(13) *Cruise*, 202.

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been discharged upon a foreign attachment as the trustee of *Jones*; and if the land cannot be taken as his, then a debtor may enjoy the rents and profits of as much real estate as he has the means of purchasing, and bid defiance to his creditors. For as to a remedy against his person, it would be very inadequate, even if he kept himself within the jurisdiction of our courts, which it would be easy for him to avoid. This fraud, it will be perceived, may be practised by citizens as well as aliens.

Further, in this way aliens may enjoy all the real estates within their means of purchasing, and thus possess the rights of citizens, without being obliged to any of their duties, against the policy of all wise governments. The commonwealth, too, in this way would be defrauded of its right to the estate of aliens by forfeiture.

The estate in question, at the time the demandant attached it, was not *Williams's*, for he had divested himself of it by his deed to *French*. It was not *French's*, for he has sworn that he paid no consideration for it, and had no interest in it. It must then be admitted to be *Jones's*; for an alien can purchase real estate, and can hold it, until government exercise their right upon it. A creditor may then seize it in execution, and hold it at least until the government see fit to dispossess him.

Taking the whole transaction before the Court together, it cannot be considered otherwise than as creating a use in *Jones*. Taking the bond as a part of the deed, as it ought to be, *French* held the estate for the use of *Jones*; nor did he ever assume to himself any control over it. The possession of *French* having been transferred to the use, any attempt on his part to convey the fee would have been a tortious act. In fact, instead of having an absolute fee simple, some of the highest attributes of it appear to have been transferred to *Jones*. *French* had no power to control or *convey the estate but according to *Jones's* [* 438] direction; so that in no respect, upon a fair construction of the bond, and the intent of the parties, could *French* have taken an absolute estate to himself.

A use is defined by *Gilbert* to be "an equitable right to take the profits of an estate, and extends to all who come in privy to the use." Thus *Jones* paying the whole consideration money to *Williams*, and the conveyance to *French* being merely nominal, an equitable right vested in *Jones* to receive the profits of the estate. (14)

It can never be said that the remedy on the bond was an adequate remedy for *Jones*. He and his attaching creditors had a right to

(14) *Shep. Touch.* 482. — *Ambler*, 410. — 2 *Vern.* 440.

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the use itself. Chancery would enforce a specific performance, even were it a trust.

But even allowing that *Jones* could not enforce his use or trust against *French*, it does not follow that his creditors could not. We contend that the transaction was in itself a fraud in law, on the part of *Jones* and *French*, of which a creditor of *Jones* may take advantage, although *Jones* himself might not; as a grantor in a fraudulent deed cannot avoid it, although his creditor may.

As *French* held the estate subject to an obligation of conveying it to any person *Jones* should elect, his election ought to be considered as made in law, when the estate was taken to satisfy his *bonâ fide* debts; and if the trust in *French* was a fraud in law, the creditor ought to hold it by virtue of his extent, as well against him as *Jones*.

It cannot be pretended that *Batson* was an innocent purchaser without notice; the record shows he had notice, and knew all the facts; nay, he himself attached at the same time a part of the estate as the property of *Jones*, and received seisin of it on execution. He was also a witness to the lease from *French* and *Jones*. If a first mortgagee witness a second mortgage deed, he loses his priority, unless he gives notice. (15) *Batson* had knowledge of all the facts attending the *demandant's* attachment and extent upon this land; and it is fraudulent in him to avail himself [* 439] *of the right of an innocent purchaser without notice.

The action stood continued to this term; and now the opinion of the court was pronounced as follows by

SEWALL, J. The demandant relies for his title and seisin on the levy of an execution; and it appears that the premises in controversy were, on the fifth day of March, 1799, set off to him, and he accepted them, as the real estate of *David Jones*, in satisfaction of judgment recovered against him; the premises having been attached upon the writ, by which the suit was commenced, and the levy and extent being within thirty days after the judgment was rendered.

Against this supposed title the tenant contends, that the premises taken in execution were never the real estate of *David Jones*; and for his title to them relies on a deed of bargain and sale from one *George French*, made subsequent to the attachment in the demandant's suit against *Jones*, but before the execution against him was extended.

The controversy is therefore to be decided on the single question,

(15) *Powell on Mortgages*, 184, 186, 295

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which has been fully and ingeniously argued upon the case reserved, whether the premises demanded were the estate of *David Jones* at the time when they were attached upon the demandant's writ; to which time the subsequent levy of his execution has relation, so as to avoid any mesne conveyance or title derived by or from *David Jones*.

In tracing this title we find that the premises in controversy, with other adjoining real estate, were, in May, 1798, conveyed in fee simple, by a deed duly acknowledged and recorded, from one *Michael Williams* to the said *George French*; and the deed is expressed to be made for a valuable consideration in money paid him, and it purports to be a deed of bargain and sale, to the sole use and behoof of *French* and his heirs and assigns.

The parties have agreed that *Williams* was, until the execution of this deed, the proprietor and owner of the estate thereby conveyed; but the demandant adduced some * parole [* 440] testimony, particularly that of *George French* himself, to prove that the bargain from the estate conveyed to him, and which he has since conveyed to the tenant in this action, was made for *Jones*, and that the consideration acknowledged by the deed was in fact paid by him.

It was further proved by the same parole testimony, that immediately after the deed to *French* was made and received by him, or at the same time, he executed a bond to *Jones* in the penal sum of 1000 dollars, conditioned to convey the premises purchased of *Williams* to any person whom the said *Jones* should appoint.

If upon this evidence the title to the demanded premises should be adjudged to have been in *Jones* at the time of the demandant's attachment, and to have continued in him by relation until taken by his execution, it must be so adjudged altogether upon parole testimony, contradictory to, and controlling a solemn deed, acknowledged and registered, and accepted by the witness; who is thus employed to defeat a title which he himself has conveyed to the tenant.

Even the bond upon which the demandant relies, as the only written evidence of *Jones's* title, is not produced. It may be said that, from the nature of the case, the bond is not in the power of the demandant; and so it appears. But, then, it also appears that it is not in the power of the tenant. And if written evidence is at all essential to the demandant's title, this is not the case where parole evidence of the contents of a writing may be received, and have the effect which the writing itself would have; as where a writing is in the power of a party, against whom it is to be used and after due notice he refuses or neglects to produce it.

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I am also inclined to think the witness examined in this case incompetent, and that he ought not to have been received to swear that he had no title, after he had undertaken to convey a title to the tenant. It is stated, indeed, as the opinion of Lord [* 441] *Holt*, that a man, who conveys land, *may be a witness to prove he had no title, although not compellable to give such evidence. But this is certainly opening a door to fraud; especially where the witness, as in this case, is supposed to have conveyed without warranty. And the evidence received at the trial, to affect the tenant, as having knowledge of the transaction with *Williams*, that it was in fact for the use of *Jones*, does not remove the objections, which arise in my mind, to the competency of the evidence, upon which the proof of the demandant's title is supposed to rest. (*a*)

The circumstance that the tenant was a subscribing witness to a lease, in which *French* and *Jones* joined as the lessors, affords no necessary presumption that he knew the contents of the instrument; or, if he did, that he had knowledge of the nature of *Jones's* title. From the subsequent conduct of the tenant it may be collected that, after a belief on his part that *Jones* had the title, he became in some way satisfied that he had been mistaken; and he now relies upon a title obtained from *French*.

However, in the argument upon the general question reserved, it seems to have been taken by both parties as sufficiently proved at the trial, that the conveyance to *French* was for a consideration paid by *Jones;* and that in consequence *Jones* holds, or at least had a bond from *French*, by which he engaged to convey the premises purchased, as *Jones* should appoint.

It is true, that by the ancient common law, the use or beneficial interest in lands, after a bargain concluded, and the purchase money and consideration paid, arose to the bargainee, even before any assurance or writing. But the transfer of the use was not a transfer of the land itself; and the only remedy of the bargainee, or *cestui que use*, was in chancery. And after the statute of *Hen.* 8, by which the land was transferred to the use, or according to the use or beneficial interest; in the same parliament, as Lord *Bacon* observes, provision was made by statute, that land should not pass away by a mere verbal bargain and sale [* 442] *upon payment of money, nor unless there was a writing indented between the parties. (16)

Provisions to the same purpose have been enacted with us, and

(*a*) [Vide, contra, *Worcester* vs. *Eaton*, 11 *Mass. Rep.* 368. — *Loker* vs. *Haynes*, ib 498. — *Bridge* vs. *Eggleston*, 14 *Mass. Rep.* 245. — E.]

(16) *Bacon's Law Tracts*, 150. — *Com. Dig. tit. Covenant, G.* 1.

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have been in force from the earliest migration of our ancestors to this country. Those by which the transfer of real estates is regulated at this time, are to be found in the revised statutes. (17) As I understand these provisions, no estates, certain or uncertain, in messuages, lands, tenements, or hereditaments, beyond an estate at will, can be made or created by parole, whatever may be the consideration paid for the same; nor can any estate or interest in, to, or out of any messuages, lands, tenements, or hereditaments, be assigned or granted, unless it be by deed or note in writing; and grants and assignments, as well as all declarations or creations of trusts or confidence of any lands, &c., are to be manifested and proved by some writing. And besides all this, deeds and conveyances of lands, to avail against any other than the grantor or his heirs, are to be acknowledged and recorded.

In the case at bar, therefore, the parole testimony of the verbal bargain, and of a consideration paid by *Jones*, can have no operation upon the deed of *Williams* to *French*, to raise a use to *Jones*, his heirs or assigns, either from the grantor or grantee. No such use, or intent of the parties, is expressed in the deed itself, or is to be collected from it, but the contrary; unless we suffer the deed to be controlled by the contradictory verbal testimony; or unless a use can arise without any written contract or declaration.

The statute provision is also in the way, to prevent any application of the parole testimony to the condition of the bond given by *French*. If a use arises upon the bond to *Jones*, such a use or trust as may be construed a transfer or grant of an estate to him, or which may become so by the operation of the statute of uses, the assignment, grant, creation, or declaration of the use, must be in writing, even to affect *French*, if the controversy was with him. Now, * the condition of this bond, taking it [* 443] to be according to the parole testimony respecting it, contains no acknowledgment of any consideration of money paid by *Jones*, or of any intention of holding the estate conveyed, to the use of *Jones*, his heirs and assigns. On the contrary, taking the written evidence resulting from the deed and bond in connection, without suffering it to be controlled by the verbal testimony, the premises in controversy, and the other tenement conveyed to *French*, were to be holden to his sole use in fee simple; until an appointment by *Jones* and a compliance with it by *French*; for which purpose he engages to execute another conveyance; and if he should refuse, the only remedy for *Jones*, in this jurisdiction, where no chancery power exists, would be an action for the penalty. The

(17) *Stat* 1783, *c.* 37.

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words, therefore, which plainly express a different intention of the parties, are not apt or suitable to raise a use to *Jones*. (18)

There is a further objection, which is insuperable, unless resort be had to the parole testimony; and that is, the condition of the bond contains no acknowledgment or proof of a consideration paid by *Jones*. (19) The bond does not necessarily import a consideration, for it may be enforced to the extent of the penalty, although made without any consideration; and there is nothing in the condition, which imports a consideration of any kind. And although it is said, a consideration consistent with the deed, or with the considerations expressed, may be averred, (20) yet this is in cases where a use is declared, but not where the use itself depends upon proof of the consideration.

And when this case is considered, as it arises between the demandant and a stranger to the contract, whatever it was, or might have been construed to be, between *French* and *Jones*, it seems impossible to construe it a conveyance executed, or a transfer in any form to *Jones*, which can avail against the conveyance from *French* to the tenant in this action. To give this effect [* 444] to a bond, which contains * no expression of transfer, no declaration of a use, importing a different intention of the parties, and not acknowledged or recorded, or required to be so for any of the purposes expressed to be intended by it, would give occasion to a novel form of conveyance, and one that must have an alarming and dangerous tendency; even if restricted to a case of actual notice to the party liable to be injured by it. What danger could he apprehend from a pocket conveyance, if so it may be considered, depending upon the will of his grantor whether it should ever be disclosed, and containing no intimation of a title vested in *Jones*, and arising to him, if at all, by a very enlarged application of the doctrines of uses and trusts? Compared with the inconveniences to purchasers from this quarter, the possible inconvenience to creditors, from a concealment of the property of their debtors, is light and trivial.

Cases will rarely happen, where a citizen will vest his property in real estate upon a title depending upon private confidence, where the law affords no specific remedy, and no security against the accidents to which the trustee, as well as the owner of the beneficial interest, is exposed. And as to aliens, it is hardly a supposable case that a credit is afforded them upon their property in real estate, unless it happens from an entire want of caution, or some gross mistake.

(18) *Com. Dig. tit. Covenant, G.* 2. (19) *Ibid. G.* 3.
(20) 2 *Co.* 76, *Cromwell's case.*

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I have not, in the examination of the question reserved in the case at bar, taken any notice of the circumstance, that *Jones* was an alien, and that he was induced by it to adopt a form of conveyance, intended as a security of his purchase in real estate against an escheat to the government. It is merely the consequence of a civil disability, not of any crime or offence, that an alien cannot acquire a permanent property in lands; and when he confides the legal title to a citizen, and depends absolutely upon him for the avails of his purchase, this is rather a conformity to the laws, than an evasion of them. The principles of the common law, applicable to this subject, are not to be * understood or employed [* 445] as nets for forfeitures; but as a security against an undue foreign influence, which might happen to be injurious to the political concerns of a nation. Aliens, therefore, although capable of purchasing real estate in perpetuity, and of conveying it, yet hold it at the will of the sovereign of the territory where they reside. But this condition or disability, arising out of their particular relation to the community, has no effect upon the forms of conveyance; which are to be the same, and to receive the same construction in the case of an alien as in the case of a citizen. (*a*)

Demandant nonsuit.

(*a*) [*Township No. Six* vs. *M'Farland*, 12 *Mass. Rep.* 325. — Vide *Goodwin* vs *Hubbard & Al.*, 15 *Mass. Rep.* 210, and *note* to that case. — ED.]

JOHN BROWN *versus* THE PRESIDENT, DIRECTORS, AND COMPANY OF THE PENOBSCOT BANK.

The act of 1809, c. 37, § 1, imposing a penalty of two per cent. per month on the amount of bills of any bank, of which payment is by such bank refused, militates with no principle of the constitution, either of the *United States* or of this commonwealth.

THE declaration, which was in case, contained the following count: — "And also for that, at said *Buckstown*, to wit, at the said *Boston*, on the fifteenth day of January last past, the plaintiff was the lawful possessor and bearer of sundry bank notes of the said corporation, whereby said corporation had promised the bearers of said notes respectively to pay them the sum of money in the same notes respectively mentioned, and all of which sums amounted, as the plaintiff avers, to 6160 dollars; and being so the possessor and

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bearer of said notes, the plaintiff then and there presented the same to the said corporation, at their place of discount and deposit at said *Buckstown*, and demanded payment thereof; but the said corporation did then and there utterly refuse so to do; — whereby, and by force of the statute in such case made and provided, the said corporation became liable to pay to the plaintiff, beside the said principal sum after the rate of two per cent. per month thereon, by way of additional damages for the non-payment of said sum, from the time of said demand until the same [* 446] should * be paid; and being so liable, the said corporation promised the plaintiff to pay him the same sum accordingly; yet, though requested," &c.

The declaration also contained two special counts on the bill of exchange or draft hereafter mentioned, and a count for 10,000 dollars, money had and received.

The cause came before the Court on the following agreed statement of facts, *viz.*: —

"On the 5th of September, 1809, the plaintiff held in his possession, and was the proper bearer of bills of said bank, to the amount of 6160 dollars, which he duly presented to said bank, and demanded payment of the same. The cashier of the said bank, having no specie on hand, drew his bill or draft on *John Crosby*, Esq., president of said bank, in the words and figures following; —

"6160 Dolls. —— At sixty days' date, pay to *John Brown* or order six thousand one hundred and sixty dollars, and interest until paid, on his delivering to you the original sum in *Penobscot* bank bills in *Boston*.

Jahaziah Shaw, { Cashier of *Penobscot* Bank.

John Crosby, Esq., at *Boston*.

"Which bill or draft, with the original bills of said bank to the amount thereof, was presented at the last and usual place of abode of the said *Crosby* in *Boston*, on the sixth of November, 1809, for acceptance, and not being accepted, was duly protested for non-acceptance, and due notice thereof given to said bank. On the 15th of January, 1810, the plaintiff again presented the said first-mentioned bills to the said bank, and demanded payment thereof, which was refused, the bank not having specie for the payment thereof. Afterwards, on the same day, this action was commenced on the said bills, and on the said draft. — The said parties further agree, 1. that the special count declaring on said bills shall be considered as good and sufficient, as if each bill had been separately declared on. 2. That if the Court shall be of opinion that the act, on

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which the plaintiff * claims two per cent. a month on the [* 447] amount of said bills, as declared for in this suit, is constitutional, judgment shall be rendered for the plaintiff for 6160 dollars, and interest at two per cent. a month from the said 15th of January, 1810; unless the receiving of the said draft, and the holding of the said bank bills, as above, shall, in the opinion of the Court, exempt said bank from such penalty or interest. 3. That if the Court shall be of opinion, that such penalty or interest at two per cent. a month is not recoverable, then judgment shall be rendered for 6160 dollars, with six per cent. interest from September 5th, 1809, if the Court are of opinion that a bank is under a legal obligation to pay interest at all on its bills not paid when presented for payment. 4. That if the Court are of opinion that the said bank is not holden to pay any interest, judgment shall be rendered for the said sum of 6160 dollars, with costs. 5. That the said bills shall be considered as filed in Court, and be delivered to the defendants, or their agents, on the satisfaction of said judgment. It was also agreed that the bank bills above mentioned were dated and issued before the passing of the act above referred to."

The cause was argued at the last March term in this county by *Prescott* and *Crane* for the plaintiff, and by the attorney general, *Morton*, for the defendants.

Crane, for the plaintiff, stated his demand on these facts to be the principal sum of 6160 dollars, with interest at six per cent. per annum from the 5th of September, 1809, the time of the first demand, to the 15th of January, 1810; and from that time he claimed additional damages at the rate of two per cent. per month. For the latter claim he relied on the statute of 1809, *c.* 37, § 1, by which it is enacted, " that from and after the first day of January, 1810, if any incorporated bank within this commonwealth shall refuse or neglect to pay on demand any bill or bills by such bank issued, such bank shall be liable to pay to the holder of such bill or bills after the rate of two per cent. per month, on the amount thereof from and after * the time of such neglect [* 448] or refusal; to be recovered as additional damages, in any action against said bank for the recovery of said bill or bills."

Morton, [attorney general,] for the defendants, argued that the act cited was unconstitutional, as being *ex post facto*, and in its operation highly penal. But if this objection did not strictly apply, still it was void as impairing the obligation of a contract, which he considered to have been made by the legislature with the defendants in the act incorporating them, [*stat.* 1805, *c.* 112.] By that act the government granted to the corporation the privilege of issuing

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their bills to a certain amount, with the implied condition only that if they should neglect to pay them on demand, they should be holden to pay lawful interest thereafter on the amount so unpaid. And by the sixth section of the act, there is a further condition that the incorporation shall be declared forfeited and void, if the corporation shall exceed its legitimate powers, or fail to comply with the fundamental rules prescribed for its conduct. The legislature were not authorized thus to single out a portion of the citizens, and subject them to a severe penalty for their neglect of punctuality in fulfilling their engagements, from which all other classes of citizens are exempted. They might as well have imposed the penalty on citizens of a particular trade or profession. Such an act would only have exhibited the same principle in a light somewhat stronger.

Prescott, for the plaintiff, in reply, considered the notion of a contract between the government and corporation as too fanciful to need any observation. This is to be considered as establishing a rule or measure of damages, applied to certain bodies politic, who received their existence from the legislature, which being wholly prospective in its operation, violates no principle of the constitution. The inconvenience, which this statute was intended to cure, is well known to have been excessive. So far from this being a [* 449] measure tending to impair the obligation of contracts, * its whole effect is to strengthen and enforce the obligation. It is essential to the existence of a banking institution, that their bills be paid at sight; and it was the right, not less than the duty, of the legislature, by all means in their power, to compel punctuality in every instance. For this end, the provision of this statute is much less severe than a repeal of the charter, which is agreed to be within the authority of government, when the corporation shall fail to conform to its duties.

The action stood continued for advisement to this term; and now *The Court* observed that if the act, upon which the plaintiff relied in this case, was unconstitutional, and therefore void, it must be by force of some specific provision in the constitution of the United States, or in that of this commonwealth. But none such had been cited at the bar, nor was any such known to exist. The incorporation of a banking company was a privilege conferred by the legislature on the members. Punctuality and promptness in meeting every demand made on such an institution is essential to its very existence; and a failure in this respect, now that bank bills form almost exclusively the circulating medium of the country, is a public inconvenience of great extent, and introductive of much mischief. It was therefore a duty highly incumbent on the legislature,

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by all means within its constitutional authority, to prevent and punish such a mischief, and this the rather as these corporations derived all their powers from legislative grants. The provision made by the act under consideration was equitable and wise; and the community is probably indebted to it for the correction of an evil, which at the time of passing the law had increased to an alarming degree. As it had no retrospective effect, there was no ground of complaint on the part of the banks, nor did it militate against any known and sound principle of legislation.

The plaintiff is entitled to the benefit of the rule of damages prescribed, from the 15th of January, 1810, the day of * the first demand after the act went into operation, [* 450] which was on the first of that month. Regularly he would be entitled to these damages from the demand of payment to the entering of judgment; but as in this case the action has been continued since the last law term for the convenience of the Court, it would be a hardship on the defendants to hold them liable to the extra damages during that term.

Upon the whole, the plaintiff is entitled to judgment for the amount of the bills, on which payment was refused, with additional damages at two per cent. per month from the time of the demand and refusal to the last March term, and interest on the original sum at the rate of six per cent. per annum from that time to the present.

JOHN FAIRBANKS, JUN., *versus* ALEXANDER TOWNSEND, ESQ.

An endorser of an original writ is not answerable to the defendant for costs taxed for him pursuant to the *stat.* 1803, *c.* 155, § 5, where the plaintiff, having appealed, recovers judgment for a less sum than fifty dollars, and costs are given to the defendant.

THIS was a writ of *scire facias*, brought against the defendant as endorser of a writ, heretofore sued out by one *Leonard Bemis* against the now plaintiff, in which action *Bemis* having recovered less than fifty dollars damage, upon his own appeal to this Court, *Fairbanks* had judgment for his costs, pursuant to the statute of 1803, *c.* 155, § 5.

It being agreed that *Bemis* had been committed in execution for the said costs, had been discharged on taking the poor debtor's oath, and was unable to pay, the parties to this *scire facias* submit

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ted to the decision of the Court on the following questions, *viz.* : — 1. Whether an endorser of a writ was liable for the costs recovered by a defendant in such a case. 2. Whether a *scire facias* lies against an endorser of a writ recovered by a defendant. 3. Whether, in the original action, the now plaintiff was entitled to judgment for his costs.

If, on either of these questions, the opinion of the Court should be with the defendant, the plaintiff agreed to become nonsuit: otherwise the defendant agreed to be defaulted; and judgment was in either case to be rendered accordingly.

[* 451] * *Whiting* for the plaintiff.

Townsend pro se.

By the Court. The last question cannot come before us in this action. If the judgment was wrong, a writ of error must be brought to reverse or correct it.

By the provincial act of 13 *Ann*, *c.* 1, the attorney endorsing a writ was liable, if the principal was out of the province or unable to pay, for the costs arising to the defendant by his arrest, and charges of imprisonment, in case the plaintiff discontinued, became nonsuit, or that judgment passed against him.

The statute of 1784, *c.* 25, which is a revision of former laws on the same subject matter, enacts in the sixth section that the plaintiff's agent or attorney, who shall endorse his name on the writ, shall be liable, in case of the avoidance or inability of the plaintiff, to pay the defendant all such costs as he shall recover, and to pay all prison charges that may happen, *where the plaintiff shall not support his action.*

Now, in this case, the plaintiff did support his action; but notwithstanding this, the law has made him liable to costs, as a penalty for bringing his action by appeal to this Court. The endorser of the writ is not answerable in such a case.

Plaintiff nonsuit.

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ROYAL MAKEPEACE *versus* JOHN COATES, AND JOHN COATES *versus* ROYAL MAKEPEACE AND RUFUS DAVENPORT.

The Court will not permit one judgment to be set off against another between the same parties, when it appears that persons other than the nominal creditor are interested by assignment of the demand on which one of the judgments is rendered.

THE first-named action was by *Makepeace*, as endorsee, against *Coates*, as the maker of a promissory note. In that action the defendant was defaulted.

The other action was upon a promissory note made by *Makepeace* and *Davenport* to *Coates*. The demand in this action was not disputed; but *Makepeace* filed therein the following motion, *viz.*: —

"Now the said *Makepeace* moves the Court here, [* 452] that so much of the judgment rendered in his favor in his action against the said *Coates*, in this Court during the present term, as shall be equal to the debt and the costs of suit recovered by said *Coates* in this action, may be set off against the same, and that all further proceedings therein may be stayed, upon his entering on his record a *remittitur* of so much of the damages recovered by him in said first-mentioned action."

SEWALL, J., delivered the opinion of the Court.

The purposes of this motion are, we have no doubt, within the legal discretion and authority of this Court by virtue of their superintendence of all legal proceedings depending before them. There is a statute provision for a set-off of cross executions, where the creditor in one execution is debtor in another. (1) The same equitable arrangement is more conveniently effected in the manner proposed by this motion; where at the same term cross actions are depending for mutual debts between the plaintiffs and defendants respectively.

Against the rule proposed to be entered in these cases, the counsel in the action depending in the name of *Coates* shows cause; and alleges that suit to have been commenced upon a demand, which has been assigned, for a valuable and adequate consideration, and to be now prosecuted for the benefit of certain creditors of *Coates*, he being an insolvent person; and further, that the promissory note, demanded by *Makepeace* in his suit, was purchased by him

(1) *Stat.* 6 *Geo.* 2, *c.* 2.

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after the known failure of *Coates*, although before the assignment of his effects, including the demand in question, was executed.

It is obvious, upon this statement, that the interference of the Court, in the summary way proposed, may operate to the prejudice of persons beneficially interested in the demand prosecuted in the name of *Coates*; and that we may thus preclude an investigation, in a case where the equitable rights of *Coates's* other creditors ought to be preserved.

[* 453] * Without discussing, therefore, the merits of the question thus arising between the real parties in these suits, it is enough, in deciding upon the motion submitted to us, to say, that the present is not a case where the Court ought to interfere by any judicial act, out of their ordinary course of proceedings; whatever might be their authority in a case where the exercise of an equitable and legal discretion would be liable to no reasonable objection, or any uncertainty as to the rights of the parties concerned.

JOHN HENRY *versus* NATHAN JONES.

A promissory note made payable in a given number of days, without saying more, is payable in so many days from the date, exclusive of the day of the date.

CASE by the endorsee against the endorser of a promissory note, with an additional count for money had and received.

On a trial upon the general issue, which was had before *Parker*, J., November term, 1810, a verdict was taken for the plaintiff, subject to the opinion of the Court on the following facts reported by the judge who sat at the trial: —

Timothy Whiting made his promissory note for 5000 dollars, dated March 4th, 1809, payable to the defendant or his order *in sixty days* with interest. On the same day *Jones* endorsed the note to *Henry*. In the afternoon of the 2d day of May, 1809, at *Boston*, the plaintiff presented the note to *Whiting* for payment, who said he could not pay it then, or at any time, unless the plaintiff would receive the assignment of a certain note for 500 dollars in part satisfaction, which was refused. The conversation between the parties continued until after dark. Before the post-office was closed, and after the conversation above mentioned, and after the mail for that day had gone to *Medway*, where the defendant then resided, the plaintiff put a letter into the post-office addressed to the defendant.

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giving notice of the non-payment of the note in due form. The same evening the plaintiff sent his agent, with the note and a written order to the defendant, to enable the agent to receive payment of him. On the 3d day of May, at 5 *o'clock [*454] in the morning, the agent presented the note and order to the defendant, and gave notice of the presentment of the note as aforementioned to the promisor, and of his neglect to pay the contents. The defendant said he was unable to pay it, or any part of it. The agent asked if the money could be paid during that day; and was answered in the negative. The writ was then served by attaching the defendant's real estate at 25 minutes past 5 o'clock in the morning, and a summons was left on the 20th day of June following. The writ bore date the same day of the attachment.

The cause was argued upon this report at the last March term in this county by Mr. *Solicitor General* for the plaintiff, and *Bigelow* for the defendant.

Bigelow objected to the verdict, that the demand on the promisor and notice to the endorser were made too soon; and he argued that the note in this case being made payable in sixty days, without saying more, must be taken the same as if made payable in sixty days *from the date*, which would exclude the day of the date; and so the note was not payable until the 3d of May. (1)

The Solicitor General contended that the day of the date was regularly to be included in computing the sixty days, and he cited the case of *Bellasis* vs. *Hester*, (2) and an anonymous case in 1 *Lord Raym.* 480. — He also read a certificate subscribed by several of the cashiers and clerks of the banks in *Boston*, purporting that it is the custom of the banks to include the day of the date, in computing the time when a promissory note falls due, which is made payable *in* a given number of days: thus a note bearing date on the 1st of March, payable "*in thirty days*," would be held due by the custom of the banks on the 30th day of March.

But he argued that notice under the circumstances of this case was waived; or that both the promisor and endorser declaring themselves unable to pay the demand was equivalent to a waiver, since no possible inconvenience arose to the defendant from a want of due notice. (3)

*The action stood continued to this term for advise- [*455] ment.

By the Court. The endorser is not chargeable upon his endorse-

(1) 1 *L. Raym.* 84, *Hatter* vs. *Ash.* — 3 *Selw. N. P.* 997, *Anderson* vs. *George* 1 *Esp. Rep.* 261, *Wiffen* vs. *Roberts.* — *Kyd on Exchange*, 6.
(2) 1 *L. Raym.* 280. — 5 *Rep.* 1, *Clayton's case.* — *Com. Dig. Temps. A.*
(3) *Chitty*, 162, *note* 1, *Amer. ed.*

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ment unless the holder can show a demand regularly made on the promiser on the day the note falls due, or due diligence to make such demand. — Where a note is payable in a certain number of days *from the date or from the day of the date*, the day of the date is to be excluded in the computation. In the case at bar, the note was made payable *in sixty days*, without adding, as is customary, from the date. But the intention is apparant; and the Court will supply the omission. The meaning must be the same as in sixty days from the date; otherwise a note payable in one day would be payable immediately, which would be an absurdity. No action lies against the endorser, until after the demand made *on* the day of the maturity of the note. In this case the demand was made on the day preceding, and not on the day fixed by the parties for the payment. Let the plaintiff be called.

Plaintiff non suit.

DANIEL HASTINGS *versus* EBENEZER WISWALL.

Upon a note made payable in a certain number of years, *with interest annually* judgment can be recovered only for simple interest on the principal sum.

ASSUMPSIT by the endorsee against the endorser of a promissory note of the following tenor, *viz.*

"*Cambridge*, June 5th, 1804. — For value received of Mr. *Isaac Nichols*, I promise to pay him or order the sum of three thousand seven hundred and fifty dollars in five years from date, *with interest annually*

Asa Nichols."

The defendant was defaulted at the last term, and the action was continued for judgment by consent to this term.

Upon inspection of the note, it appeared that the interest had been paid for the two first years. — The plaintiff now moves the court for judgment, and for a direction to the clerk, that when making up the damages, the interest due by the terms of the note at the end of each year should be added to the principal,
[* 456] and interest be cast on the aggregate * of those two sums, and so from year to year, to the time of the judgment.

But the Court denied the motion, observing that the plaintiff might have brought his action for the interest at the expiration of

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each year, and that by neglecting this he might be considered as waiving his claim to compound interest. The clerk was directed to add simple interest to the principal for the time that the interest remained unpaid, and to enter up judgment for that amount with costs.

Munroe for the plaintiff.

Fay for the defendant. (*a*)

(*a*) [There seems to be no reason why interest should not be allowed upon the interest due annually from the time when it became due. But compound interest cannot be recovered. See *Greenleaf* vs. *Kellogg*, 2 *Mass. Rep.* 568, and *note* to that case. — ED.]

JOSEPH WINTHROP *versus* MOSES CARLTON, JUN.

It is no cause to abate a writ, that the defendant has been sued as the trustee of the plaintiff, and that the process is still pending; but it is ground for a continuance while the process is pending; and during such continuances the plaintiff may not tax costs for travel and attendance.

THE declaration in this case was in *assumpsit*, and contained the usual money counts.

The defendant pleaded in abatement, that he had, before the service of the writ in this action upon him, been summoned as trustee of the plaintiff, at the suit of one *Abiel Wood*, Jun., for a just demand of the said *Wood*, and the said process was still pending in the Supreme Judicial Court for the county of *Lincoln*, and he the said *Carlton*, undischarged thereof; but still remains liable upon the same suit for all the goods, effects, and credits of the plaintiff in his, the said *Carlton's* hands, and possession at the time of the service of the said *Wood's* process upon him; and he avers that all and every the causes and rights of action contained in the plaintiff's declaration in this action, which are or at any time heretofore have been in the plaintiff, were in him at the time of the said service; nor has he, the said *Carlton*, since that time, become indebted in any way to the plaintiff, nor have any of the plaintiff's goods, effects, or credits come to his hands since that time; all which he is ready to verify; wherefore he prays judgment, if he ought to be held to answer to the plaintiff's writ and declaration, and that the same may abate.

To this plea the plaintiff demurred, and the defendant joined in demurrer.

* *By the Court.* The plea discloses no sufficient cause [* 457] of abating the writ. *Non constat* that judgment will be

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rendered against the defendant in the other suit. That process depending may well support a motion for a continuance of this action; and while the action shall stand continued for such cause, it will not be proper for the plaintiff to tax his costs of travel and attendance.

G. Sullivan for the plaintiff.

J. E. Smith for the defendant.

COMMONWEALTH, in Certiorari, *versus* THE INHABITANTS OF ROXBURY.

It is a sufficient ground for the Common Pleas to discontinue a highway, that it has become *useless*.

Upon a *certiorari* to the Common Pleas, this Court will not go into the question of the expediency of discontinuing a highway.

THIS was a *certiorari* to the Common Pleas of the county of *Norfolk*, brought by the inhabitants of *Roxbury*, to obtain a reversal of an order of that court, which was passed on the petition of *Joseph Williams*, for the discontinuance of a certain highway in said *Roxbury*.

The petition for the discontinuance alleged that, by the laying out of the *Norfolk and Bristol Turnpike*, a small section of a road from *Roxbury* street to *Dorchester*, which passed over land of the petitioner, had been rendered useless, and thereupon prayed for its discontinuance.

The Common Pleas, after notice to the town of *Roxbury*, and hearing the parties, were of opinion that the said road had become useless by the laying out of the turnpike, and therefore ordered that it should be discontinued.

Whitman, for the inhabitants of *Roxbury*, took two exceptions to the record — 1. That the Common Pleas adjudged the way described in the petition to be *useless*, and grounded thereon the order for its discontinuance; whereas the statute (1) gives them authority to discontinue a way only when they shall be satisfied that it is not *expedient* that the same should be continued any longer. 2. That the Common Pleas could not discontinue the way, as being rendered * useless by the location of a turnpike road, as was the case here; it being against the princi-

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(1) *Stat.* 1797, *c.* 30

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ples of the laws authorizing turnpikes, that existing roads should be discontinued on account thereof.

Richardson for the commonwealth.

By the Court. The adjudication of the Common Pleas substantially conforms to the provision of the statute. The expression, that the road in question had become useless, has certainly as great strength, and is of as extensive import, as the expression used in the statute.

As to the second exception, the Court will not go into the question of the expediency or inexpediency of the discontinuance. That belongs wholly to the court below. But it may be observed, that the Common Pleas did not, in the case before us, discontinue the way merely because the turnpike had been laid out; but, because in consequence of the laying out of the turnpike, the way had become useless; and they were certainly competent to draw this conclusion. The respondents can take nothing by their writ.

ELIHU BATES AND MARY, HIS WIFE, Petitioners for Partition, *versus* NATHAN WEBB AND OTHERS.

One devised his estate to his wife, "*to be for her own comfort and the support of my children who are minors, during the time she remains my widow, without any disturbance, &c., from any of my children; and in case she alters her condition by marriage, then to be divided as the law directs, each child to receive an equal portion.*" — Held that the children took a vested remainder.

THE petitioners prayed for one fifth part of the land described in their petition, to be set off to them in severalty in right of said *Mary*.

The case was submitted to the Court on the following facts agreed: —

John Leach, late of *Boston*, died on the tenth of June, 1799, seised of the premises, having on the fifth of May, 1788, by his last will and testament, duly executed, and afterwards proved and allowed, devised all his estate as follows, *viz.*: — "And as to my worldly estate, real, personal, * and mixed, (after all my [* 459] just debts and funeral charges are fully paid and satisfied,) I give, devise, and bequeath the same to my wife *Sarah*, to be for her own comfort, and the support of my children who are minors, during the time she remains my widow, without any dis-

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turbance, hinderance, or molestation from any of my children; and in case she alters her condition by marriage, then my said estate, real, personal, and mixed, I will shall be divided as the laws directs; each child to receive an equal portion, without a double portion to either.

The said *Sarah Leach* survived her husband, was not afterwards married, and died intestate on the 25th of March, 1811. The said *John Leach* left ten children by his said wife, of whom the petitioner *Mary* is one. Of the others one died without issue, and four leaving issue still living, during the life of their mother; the remaining four being still in full life.

Upon these facts it was agreed by the parties, that if the Court should be of opinion, that the petitioners, in right of said *Mary*, are entitled to one fifth part of the premises, partition should be made accordingly; and if the Court should be of opinion that the petitioners are entitled to one ninth part, or to any other portion of the premises, partition should be so made; and in either case the petitioners' proportion of the premises be set off to them.

Sullivan, for the petitioners, seemed satisfied that all the children took a vested remainder at the death of their father; and of course that the petitioners could demand no more than one ninth part.

Jackson for the respondents.

By the Court. The petitioners are seised in fee simple of a ninth part only of the estate devised, and let a warrant issue to set off the same to them in severalty.

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*ROBERT LENOX *versus* ZEBEDEE COOK.

When a bill of exchange is protested for non-acceptance, a right of action accrues immediately to the holder; he is not bound to present it at maturity for payment, nor, if he does, is his right of action on the non-acceptance affected thereby.

ASSUMPSIT by the plaintiff as endorsee of a bill of exchange, against the defendant, as surviving partner of the house of *Aubin* and *Cook*, endorsers of the bill.

A trial was had, upon the general issue joined, before *Parker*, J., at the last November term in this county, when it appeared that the bill in question was drawn for £300 sterling, on the tenth of August 1809, by *Joseph Cutler*, of *Newburyport*, on Mess. *Smith* &

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Co., merchants in *Liverpool*, in favor of *Joseph Hooper* or order, payable in sixty days after sight, and endorsed by said *Hooper*. It was purchased by *S. Willard*, the agent of the plaintiff, of *Aubin* and *Cook*, and endorsed by them. It was immediately sent on to the plaintiff in *New York*, who sent it by the first opportunity to the house of *Logan* and *Lenox* in *Liverpool*, to be by them presented for acceptance. On the twenty-seventh of October following, the bill was presented for acceptance, and refused; and it was regularly protested for non-acceptance, and notice thereof, with the protest, immediately sent out to the plaintiff in *New York*, who also, immediately after receiving the protest, forwarded it to Mr. *Willard*, his agent in *Boston*, who, on the fourth of January, 1810, notified the defendant thereof, and was informed by him that there was a person in *Liverpool* who would undertake to see the bill paid. Two other bills, which had been purchased by the plaintiff of the defendant in like manner, and which were also protested for non-acceptance and non-payment, were taken up by the drawer's agent in *Liverpool*. The bill in question was presented for payment when it became payable, and payment being refused, it was protested for non-payment; but the protest for non-payment did not reach *Willard*, the plaintiff's agent, until August, 1810, owing to the plaintiff's correspondent not forwarding it; and no notice of this last protest was given, or any demand for payment made, except on the protest for non-acceptance.

* A verdict was found for the plaintiff, for the amount [* **461**] of the bill, with interest and damages, by direction of the judge. The defendant moved for a new trial, for a misdirection, because he apprehended that notice of refusal to pay, and of the protest for non-payment, ought to have been given within a reasonable time after those facts took place.

The action being continued to this term for the consideration of the said motion,

Jackson, for the defendant, contended that, although it is not now to be denied that the holder of a bill of exchange has presently, upon protest for non-acceptance, a right of action against the drawer and prior endorsers, yet to support such action he must have the original bill as well as the protest. In the present case the bill was not sent on until long after the protest for non-payment. So the action was brought too soon. It was not known, at the commencement of the action, that the bill was not paid at maturity.

But, further, it is contended that, after the maturity of the bill, and a presentment of it for payment, and a protest for non-payment, the former right of action for non-acceptance is gone, being merged

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in the new right of action arising upon the protest for non-payment; (1) and this new right is lost by the neglect of notice.

Sullivan, for the plaintiff. A right of action vests in the holder of a bill of exchange immediately on its being dishonored; (2) and this right is not affected by a posterior protest for non-payment; (3) which is in fact entirely unnecessary after a refusal to accept, and due protest therefor. This always does away altogether the charge of laches on the part of the plaintiff. After his right of action was vested, any attempts on his part to procure payment of the drawees, and thus relieve the parties to the bill in this country, are illy objected to him by one of those parties.

By the Court. We are all of opinion that the plaintiff has maintained his action. When one draws a bill of exchange,
[* 462] * he thereby engages that the drawee shall accept the bill when presented for acceptance, as well as that he shall pay it, when duly presented for payment at its maturity. When acceptance is refused by the drawee, a right of action accrues to the holder, after due notice. He is not bound to demand payment at the time the bill falls due, nor to protest for non-payment, nor to retain the bill for that purpose; but he may bring his action against all parties liable immediately on the refusal of the drawee to accept. Having duly notified the defendant of the dishonor of the bill, any delay in bringing the action is not imputable to the plaintiff as laches, any more than in any common case of an existing cause of action. It was for the benefit of the parties liable, to give them opportunity to pay without suit.

Judgment on the verdict.

(1) *Bayley on Exchange*, 85, 57. — *Pothier, Contrat de Change*, § 70, 133.
(2) 3 *Mass. Rep.* 557. — *Doug.* 55. — 2 *Strange*, 949. — *Chitty*, 64, 100.
(3) 3 *Johns. Rep.* 202, *Mason* vs. *Franklin.*

JOHN M. DUNHAM *versus* JOHN GILLIS.

Where three or more copartners have contributed severally and in different proportions to the joint stock, and one of them withdraws from the copartnership, in violation of their mutual agreement, each has his several remedy for a breach.

THE plaintiff declares in covenant broken, upon the following indenture, *viz.*: —

"This indented agreement or mutual contract made between

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John M. Dunham, of, &c., *John Gillis*, of, &c., and *Robert Harrington*, of, &c., witnesseth that we, the subscribers, mutually agree to enter into partnership, in the manufactory of printing ink, to be carried on at *Cambridgeport*, upon the following conditions, *viz.*: The said *J. M. Dunham* to find suitable works to carry on the business, together with his reasonable time, to superintend and make sale of said printing ink, and to receive one half of the net profits which may arise from said business, for the term of five years from the date of these presents. And the said *J. Gillis* engages, on his part, to aid and assist in the business, by advancing money for stock to carry on said business, to the amount of three hundred dollars, to be laid out as soon as is necessary to expedite the business, which sum, if necessary, to continue as a fund in the business until the expiration of the copartnership. The said *John Gillis* is to receive the aforesaid sum at the expiration of said copartnership, * with one fourth of the net profits [* 463] which may arise in said business, as received from time to time; and to share his loss in proportion to his gain, if any should occur in said business. And the said *Robert Harrington*, on his part, agrees with the said *Dunham* and *Gillis* to be and continue in the business aforesaid according to the best of his power and abilities; and for his service to receive one fourth of the net profits on said business, to be paid as the money is received, from time to time. The firm to be *John M. Dunham & Co.*, not to be published till necessary. And, for the security of the copartnership, we mutually agree that none of the parties will be accountable for any debts but what is immediately connected with the business. In witness of the above, we hereby pledge ourselves to a faithful performance." Dated June 18th, 1809.

The plaintiff avers that he hath kept and performed all the covenants on his part to be kept and performed; and that the said *Gillis*, though requested, has not kept and performed all the cov enants on his part to be kept and performed; but on the 23d day of October, 1809, seized upon, took, and carried away the said copartnership funds, stock, and materials, and sued out of the clerk's office of this county a writ of attachment, for the money by him advanced to said copartners, against said *Dunham*, and certain persons who had bought ink of said copartners, as trustees of his goods, effects, and credits; and withdrew the money advanced by him under his said covenants, and by other illegal and improper acts and doings, the said *Gillis* destroyed the establishment of said copartners at *Cambridgeport* aforesaid, &c.

After a trial had, and a verdict for the plaintiff, at the last No vember term in this county, the defendant moved in arrest of judg

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ment, assigning as a cause, that the action was brought to recover damages for the breach of a covenant entered into by him with the plaintiff and *Harrington* jointly, as appeared by the declaration in the case; and the action ought to have been brought in their joint names, and not in the name of *Dunham* severally.

[* 464] * When the cause was called up at this term for argument, it was suggested by the Court, that the indenture declared on was not on the record; and that the declaration alleged a covenant only between the plaintiff and defendant, and was in point of form sufficient. An agreement was then made that the indenture, of which a copy was furnished, was admitted in evidence at the trial, although objected to by the defendant; and if the Court should be of opinion that the same was improperly admitted, and that the plaintiff could not maintain the action upon it in his own name alone, the verdict should be set aside, and the plaintiff become nonsuit.

Townsend, for the defendant, contended that, this being an indenture of three parts, the covenants of each one were with the other two, and any action for a breach of those covenants should be brought in the name of the other parties jointly, since the injury and damages must, from the nature of the thing, be joint. (1)

Parker, for the plaintiff, agreed that where the action was against a stranger, all must join; and to this point are the authorities cited for the defendant. But it is otherwise where the action is between the parties to the agreement, as here. Their interest is in its nature several, and the damage to the plaintiff and *Harrington* was very distinct and unequal; the latter being merely a laborer, and having no interest in the funds or stock of the copartnership. (2) But if the defendant's objection is good, he is now too late to avail himself of it; he should have pleaded the matter in abatement. (3)

By the Court. This point is settled by the case of *Tippet* vs. *Hawkey*, (3) which was not cited in the argument. Here the consideration was several. The parties contributed severally and in different proportions to the joint stock. Their covenants were several, and each has his several remedy for a breach. The admission of the indenture in evidence at the trial was therefore proper.

Let judgment be entered on the verdict.

(1) *Chitty on Pleading*, 7, 12. — 1 *Saund.* 153. — 2 *Strange*, 820, 1146. — 6 *D. & E.* 770. — 1 *B. & P.* 73. — 1 *East's Rep.* 497. — 8 *Mod.* 166.
(2) 1 *Saund.* 291. — *Chitty*, 12.
(3) 3 *Mod.* 263.

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* WARD N. BOYLSTON *versus* DAVID GREENE.

When a note has been paid by the last endorser, it ceases to be negotiable; but his assignee may maintain an action upon it against the prior parties to the note in the name of the assignor; and the Court will prevent his interference to defeat the action.

ASSUMPSIT, in which the plaintiff declares, as endorsee, against the defendant, as endorser, of a promissory note made by one *John R. Greene*, dated April 21st, 1807, payable to the defendant, by him endorsed to one *Thomas Lathrop*, and by him to the plaintiff, being payable in sixty days from date with grace at the *Norwich* bank.

On the trial of the action upon the general issue before *Parker*, J., it appeared that the said *Lathrop* had procured the note, soon after its date, to be discounted at the *Norwich* bank, and had received therefrom the sum therein expressed; that at the expiration of the sixty days and grace, neither the said *John R. Greene* nor the defendant having paid the same, the said *Lathrop* paid the said note at the said bank, and having taken it up, afterwards endorsed it to the plaintiff.

The judge directed the jury, that after *Lathrop* had thus paid and taken up the note, it ceased to be negotiable, and therefore that the plaintiff could not recover. And the jury having returned a verdict for the defendant, the plaintiff moved for a new trial, for the misdirection of the judge.

Bigelow, in support of the motion, argued that the note still continued negotiable, after being taken up at the bank, unless it came within the principle of the decision in the case of *Blake* vs. *Sewall*. (1) But the facts in this case are very different from the case referred to. There the payment was by *Pomeroy*, the real debtor; and when he had discharged it, the note was *functus officio*. Here the real debtors neglected to pay, and the action is against one of them. That was a fraudulent attempt to obtain payment of an endorser, who had lent his name for the accommodation of *Pomeroy*, who could never have maintained an action against any of the parties to the note. In the case at bar, *Lathrop* had a right of action against the prior parties to the note, as soon as he had taken it up, *just as if he had kept it in his [* 466] pocket the whole sixty days; and that right he could lawfully assign to the plaintiff.

Prescott, for the defendant, insisted that the note, having been

(1) 3 *Mass. Rep.* 556.

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paid by one of the parties liable upon it, was discharged of its office, and from that time ceased to be further negotiable. The last endorsee was the *Norwich* bank; and to that it was duly paid by *Lathrop*. By that payment he became the creditor of the prior endorser and the promiser in a new right, and quite distinct in its nature from the right which he had originally on the note. (2)

By the Court. The question in this case is, whether the note declared on continued to be capable of negotiation after it had been paid by *Lathrop*, the last endorser. In such case there would be no inconvenience in considering the note still negotiable, having been paid by the last endorser, for he has a full and complete right upon the note against the maker and all prior endorsers, and their situation would not be made worse in any respect by their obligation being transferred to another.

But we find the rule laid down generally, that by payment of a bill or promissory note, the contract of the parties to it ceases, so far as to prevent their being subject to new engagements; and an endorsement cannot be made after it, so as to affect any of the parties, except the person making it.

The whole effect, however, of this rule is to make a difference in the form of action, as it respects the nominal parties. The maker and prior endorser are still liable on their respective engagements; and the plaintiff, having a *bonâ fide* transfer of the note from *Lathrop*, may maintain an action in *Lathrop's* name against either of them; and the Court will see that no interference of the nominal plaintiff shall prevent a recovery. (*a*)

Judgment on the verdict.

(2) *Chitty on Bills*, 115. — 1 *H. Black.* 89. — *Beck* vs. *Robley*, *Bull. N. P.* 271. — 1 *Esp. Rep.* 463.

(*a*) [This decision is erroneous, and has been overruled. *Guild* vs. *Eager & Al.* 17 *Mass. Rep.* 615. — ED.]

[*467]

*NATHAN NICKERSON AND OTHERS *versus* NATHAN TYSON.

The masts, spars, rigging, and sails of a vessel at sea were carried away by the violence of the weather, and after hanging by the vessel's side for half an hour, were cut loose for the preservation of the vessel and cargo; afterwards, being met by another ship, part of the cargo was taken out of the wreck, laden on board the ship, and brought into port, the wreck being left; a salvage of one third of the cargo saved was decreed the salvors. — It was held that the owner of the cargo saved was not liable to the owner of the vessel lost for a contribution to the loss of the masts, &c.

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NICKERSON & AL. *vs.* TYSON.

THIS action was *assumpsit*, to recover a sum of money as contribution, in the nature of general average, upon a loss which happened to the schooner *Polly*, of which the plaintiffs were owners, on a voyage from *Baltimore* to *Lisbon*, the defendant being a freighter on said vessel.

The action was tried upon the issue of *non assumpsit*, before *Parker*, J., at the last November term in this county. By the evidence at the trial, it appeared that during said voyage, on the 30th of August, 1809, there was a violent gale of wind, which occasioned the carrying away by the board the bowsprit, masts, and yards of the vessel, and the rigging and sails attached thereto, suddenly and without the agency of the captain or crew of the vessel. The bowsprit, masts, &c., remained in the sea, but attached to the vessel by some of the rigging; and the ends of the masts and bowsprit were beating at times against the bow and sides, until it was determined by the master and crew, for the preservation of the vessel and cargo, to free them from the vessel, which was half an hour after they were carried away; and then the rigging was cut, and those articles went adrift. The captain and crew remained on the wreck until the 8th of September, having erected a jury-mast, and patched together some peices of sails; but were unable to make way, when they spoke with the brig *Triton*, commanded by a Captain *Porter*, who, being unable to supply them with sails and rigging, took the whole crew into his vessel, and agreed to remain by the wreck until the next morning. On the next day, they were spoken with by the ship *Reserve*, Captain *Prior*, who, with the assistance of the master and crew of the *Polly*, except the mate, who remained on board the *Triton*, took on board his vessel between 800 and 900 barrels of flour and other articles, keeping the schooner in tow six days, after which he was obliged to cast off from the wreck. On the 4th of October, the said ship *Reserve* [* 468]
* arrived in *Boston* harbor, with the cargo saved from the *Polly*, which was libelled in the District Court of the *United States* for salvage; and by the decree of the judge, one third of the proceeds of said cargo was awarded to the captain of the *Reserve*, his crew, and the owners of the ship, as salvage.

A verdict was taken, by consent for the plaintiffs, for a sum as the amount of the proportion of the value of the masts, bowsprit, and rigging lost, which the defendant's property on board ought to bear, if liable to general average under these circumstances; and judgment was to be rendered thereon with interest, if the Court should be of opinion that the action is maintainable; subject to have the damages revised and corrected by assessors; otherwise the verdict was to be set aside, and the plaintiffs to become nonsuit.

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Sullivan, for the plaintiffs, cited 1 *Emerig.* 622.

Jackson for the defendant.

By the Court. The plaintiffs are not entitled to contribution upon the facts reported. Here was no deliberate act done for the preservation of the whole, except the separating the masts and rigging from the hull, after they were carried overboard by the violence of the weather. At the utmost, all that the plaintiffs could claim would be a contribution proportioned to their value, when thus hanging by the side of the vessel. But in fact the cargo has been held already to pay a salvage to another vessel, which was the means of finally saving it to its owners.

Plaintiffs nonsuit.

WILLIAM WALTER *versus* JOSIAH BACON AND ANOTHER.

The statute of 1808, c. 92, respecting the limits of prison-yards, militates with no provision of the constitution.

DEBT on bond for 5372 dollars, dated June 18th, 1808, and conditioned that the defendant *Bacon*, then a prisoner in execution at the suit of the plaintiff in the jail at *Cambridge*, should continue a true prisoner, &c.

The action was submitted to the determination of the Court upon a statement of facts, in which it was agreed

[* 469] * that the bond was duly executed; that *Bacon* was imprisoned on the plaintiff's execution issued upon a judgment for 2674 dollars 62 cents debt, and 11 dollars 42 cents costs; that after the execution of the said bond, and before the commencement of this action, and before he was lawfully discharged from prison, the said *Bacon* did, by the invitation and with the consent of *William Newman*, go to the house of said *Newman*, in said *Cambridge*, and boarded therein from the date of said bond until the commencement of this action, but was not therein at any time after sunset or before sunrise; that said house is situated within the bounds of the jail-yard, as established by the Sessions, but is no part of said jail, or the jail-house, or any of the appurtenances belonging to said jail, nor had the county of *Middlesex*, during the time aforesaid, or the jailer, any right or privilege in or to the same.

If, upon these facts, the Court should be of opinion that the said *Bacon* had not broken the condition of the bond declared on,

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according to its true intent and meaning, the plaintiff agreed to become nonsuit, and that the defendants should recover their costs; otherwise the defendants agreed to be defaulted; and in either case that judgment should be entered accordingly.

An argument was had March term, 1810, by *Jackson* for the plaintiff, and *Otis* for the defendants.

Otis relied on the statute of 1808, *c.* 92, which enacts that the boundaries of jail-yards theretofore determined and assigned by the Sessions in the several counties shall be, and thereby are, rendered legal and valid to all intents and purposes, and no person, having given bond for the liberty of the yard, shall be considered as having committed an escape in consequence of having entered into or upon any private estate or property, or into any public building, or upon any public highway or town way lying within the limits of such jail-yard; provided that nothing therein shall be construed to affect the rights of any individuals owning real estate within such limits, nor to affect any suit * wherein final [* 470] judgment had been rendered by the Supreme Judicial Court.

The facts in this action bring the case within the purview of this statute. But as the constitutional authority of the legislature to enact such a law has been questioned, it is contended for the defendants that the legislature have authority to enclose any private property within the limits of the jail-yard, so as that a prisoner continuing within such limits shall not be considered as committing an escape. This is very distinct from authorizing a prisoner to enter on such property without the consent of the owner. In so doing he would still be a trespasser. This authority the legislature may also delegate to the Courts of Sessions, who, in assigning the limits of the yards, act merely as ministerial officers.

The limits thus established include every part of the territory included within them; but the legislature do not in this way convert private houses into parts of the jail. They only provide that a prisoner not going beyond those limits is not liable to a penalty. And it is well known that this was the general understanding, before this statute was made, until the decision of the case of *Baxter* vs. *Taber*. (1) The vast mischief apprehended from that decision occasioned the passing of this law.

The act in question may well be compared, in this view of it, to the laws so frequent in our statute-book, confirming the doings of towns and other corporations at meetings not legally held, or of assessors and other officers not regularly elected or sworn, or acts

(1) 4 *Mass. Rep.* 361.

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for setting up a term of a court of law which has failed by accident, and continuing or reviving all actions pending therein. Yet laws of this kind have never been questioned, as being beyond the constitutional powers of the legislature.

Jackson. If the law relied on for the defendants takes from the plaintiff a vested right of action upon this bond, it is an unauthorized act of the legislature. Had the law, instead of [* 471] this provision, narrowed the limits of the jail * yards, and declared that every man, who had given bond, and had exceeded the limits thus reduced, had subjected himself to the penalty of such bond, it would not have gone farther in the infraction of vested rights than this act, if the legislature necessarily requires the construction contended for. So, if it should see fit to pass an act lowering the rate of interest, and declaring void all existing securities carrying a higher rate than that prescribed, would any one doubt such an act was null by our constitution?

The boundaries of prisons and their yards ought above all things to be definite and known, or the utmost confusion and mischief will arise to debtors, who have the liberty of the yard, or to their creditors. By this act it is made to depend on the will of those living within the limits, whether their closes and houses shall be within or without the prison-yard. So any house within the limits may be part of the prison one week, and the next week cease to be so; or it may be so for one prisoner, and not for another.

The acts confirming the doings of corporations, and reviving terms of courts failing from accident, have a very different aspect. Such acts deprive no man of his vested rights, and are absolutely necessary to maintain the order of society and the course of justice.

The action was continued for advisement to this term; and now

By the Court. We decided in the case of *Baxter* vs. *Taber*, cited in the argument, that by the laws then in force, the sessions could not make any lands a part of the prison-yard, except the land belonging to the county, with the public ways leading to the prison. In the decision of that cause we expressed our apprehensions that some inconvenient effects might result from the law thus made known. The legislature, at the ensuing session, passed the law which has been the subject of discussion in this cause, with an intention to prevent those effects; and the question to be now decided is, whether the legislature, in passing that act, exceeded [* 472] their constitutional powers. And * we see no provision of the constitution of this commonwealth, or of that of the *United States*, which prohibits the enacting such a law.

The statute was well likened by the defendant's counsel to laws frequently made to confirm the acts and doings of towns and other

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corporations, which have been void for some informality, and in reviving terms of courts which have failed from accidents. Such acts have never been questioned on constitutional ground. Yet the same objections would lie against them, as have been urged against the one under consideration. Upon the whole, the legislature had an undoubted right to pass this act; and by its provisions the defendants are saved from the penalty of their bond.

Plaintiff nonsuit.

NATHAN BOND *versus* NATHAN APPLETON.

By an act of the state of *New Hampshire* creating a banking corporation, it was provided, that if the corporation should refuse or neglect to pay their bills on demand, the original stockholders, their successors, assigns, and the members of the corporation in their private capacities should be liable to the holder. — It was holden that such only of the original stockholders, their successors, &c., as were members of the corporation at the time when payment was refused, were liable.

THE plaintiff declares in case, for that in and by an act of the state of *New Hampshire*, made and passed on the 18th day of June, 1806, which act is now in force, and a copy of which is in Court to be produced, a certain corporation was established, by the name of *The President, Directors, and Company of the Hillsborough Bank;* and in and by the said act it is among other things enacted, that if the said corporation, at any time thereafter, should refuse or neglect to pay any of their said bills, when presented for payment in the usual manner, the original stockholders, their successors, assigns, and the members of the said corporation, should, in their private capacities, be jointly and severally liable to the holder of any bill or bills issued by the said corporation, for the payment thereof.

The plaintiff then alleges that the said corporation on, &c., at, &c., issued certain bills, signed by the president and cashier of the said corporation, for and in behalf of the corporation, [which bills are described,] payable to **J. F.* or bearer [* **473**] on demand; and that he, being the bearer and holder of the said bills, presented them to the corporation for payment in the usual manner, which was refused; and that afterwards he gave notice thereof to the said *Appleton*, who was then and there one of the original stockholders of the said corporation, or a successor or assignee of one of the original stockholders in the same, or a member thereof; and then and there liable by reason thereof, and by the charter of the said corporation, to pay the bills of the said

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bank on the refusal or neglect of the said corporation to pay the same when thereunto requested in the usual manner, and then and there requested the said *Appleton* to pay him said bills; and that the said *Appleton*, then and there, in consideration thereof, and of his liability as aforesaid, promised the plaintiff to pay him the said bills; yet though requested, &c.

It was agreed by the parties, that the corporation mentioned in the declaration was duly incorporated as is therein alleged; that in the act of incorporation it is, amongst other things, enacted "that if said corporation at any time hereafter divide their stock previous to the payment of all their bills, or shall refuse or neglect to pay any of their bills, when presented for payment in the usual manner, the original stockholders, their successors, assigns, and the members of said corporation, shall, in their private capacities, be jointly and severally liable to the holder of any bill or bills issued by the said corporation, for the payment thereof, — any such member or members who shall have been compelled to make payment as aforesaid, shall hereby be authorized to recover of the remaining members of said corporation their proportion of the sum or sums paid as aforesaid, to be estimated according to their respective shares in said bank corporation."—That the several bills set forth in the declaration were duly issued as therein is set forth; that the said bills afterwards, for a valuable consideration, became the property of the plaintiff, and that he was at the time the *bonâ fide* holder of the
[* 474] * same; that the same were presented by the plaintiff in the usual manner for payment at the bank on the 19th of October, 1809; that payment was refused, and has never since been made; that the defendant was afterwards, on the 13th of December, 1809, and before the bringing of this action, notified thereof by the plaintiff, and requested to pay the said bills; that the defendant was not one of the original stockholders, but on the 4th of November, 1806, purchased 200 shares in the bank, which he continued to hold from that day until the 20th of July, 1808, and during that time he received three dividends on the same; that on the day last mentioned he assigned and transferred all the stock he held in said bank, which was at that time solvent and in full credit; that he held no shares in the bank at the time the plaintiff became the holder of said bills, nor had he any interest in the said corporation, other than is hereinbefore set forth.

If, upon the foregoing statement, the Court should be of opinion, that the said *Appleton* was liable in this action, it was agreed that he should be defaulted, and judgment be rendered against him for the amount of the said bills, with interest thereon from such time as by the said statement he should be liable to pay interest. — But

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if the Court should be of opinion that the plaintiff could not, on the statement aforesaid, maintain his action, he was to become nonsuit.

Otis and *Thatcher*, for the plaintiff, contended that the defendant, having once been a stockholder, was always afterwards held to answer personally for the neglect or refusal of the bank to pay their bills. This was the only true construction of the clause of the act of *New Hampshire* recited in the case; and however novel the provision might be, or however hard might be its operation, still the legislature had a right to make the stipulation; and it was for those to whom the charter was granted to determine for themselves whether they would accept it on those terms, and for the defendant to exercise his discretion * whether he [* 475] would become a member of the corporation, with such liabilities attached to the situation.

It is a settled rule of construction, that every word used in a statute or other writing is to have effect given to it if possible. Now, in this case, not only the original stockholders, but their successors, their assigns, and the members of the corporation for the time being, are made liable, jointly and severally. The defendant was a successor or assignee of one or more of the original stockholders. By becoming such, he induced upon himself the liabilities imposed by the charter, and though he has ceased to hold the stock, he has not thereby discharged himself of his responsibility. The hardship of the case is but a seeming one; since it was in his power to have taken an indemnity from the person to whom he assigned his stock. It may be presumed that he did this; and if he neglected it, this furnishes no reason why he should not be held. To confine the right of action so that none but members at the time of the failure of the bank should be held responsible, would render the provision futile; since those members who should know the misconduct of the managers, and should foresee the mischief, could easily assign their shares to paupers, or to merely nominal persons, who would be wholly inadequate to indemnify the sufferers.

It is a well-known fact that the construction contended for by the plaintiff has many strong advocates among legal characters in the state of *New Hampshire*, although no decision has yet been made of the question in the highest judicial court of that state.

Dexter and *Jackson* for the defendant.

By the Court. In the construction of a statute of another state, any decision of a judicial court in such state would be entitled to much attention and respect from us, while endeavoring to ascertain the real intention of the legislature in such statute. But as we have no such aid in this case, we must give the best construction we are able to the act brought under our consideration in this case,

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[* 476] in the * same manner we should construe an act of our own legislature.

The persons made liable for the payment of bills dishonored by the bank are "the original stockholders, their successors, assigns, and the members of the said corporation." The words are very extensive; but we think the reasonable construction of them to be, such of the original stockholders, and of their successors and assigns, as shall be members of the corporation at the time when payment of the bills shall be refused. This construction is confirmed by the remedy given in the close of the paragraph to the member or members who shall have been compelled to make payment by virtue of the preceding clause. That remedy is furnished to a member or members against the remaining members. These last must mean the existing members, or the remedy would be so difficult, as that it would be next to an impossibility to enforce it; whereas it would be very easy and simple, if it has relation only to the then members or stockholders in proportion to their respective shares.

Plaintiff nonsuit.

Samuel Gilbert and Another *versus* John Williams and Others.

The holders of prize tickets in a lottery may demand the prize money of all the managers, although the tickets are respectively subscribed by one only; but where such holders had given up the tickets to one of the managers, taking his personal promise for the amount due upon them, they were held to have thereby relinquished their claim on the other managers, and to have a right of action only against him whose receipt they had taken for the tickets.

The declaration was in case, and alleged that the defendants, with one *Phillips Payson*, since deceased, on the 6th of January 1809, in consideration that the plaintiffs had drawn, before that time, sundry prizes in the *Harvard College lottery*, of which the defendants were then and there managers, and which prizes by law the defendants, with the said *Payson*, deceased, were liable to pay to the plaintiffs, amounting in the whole to the sum of 1392 dollars, and in consideration that the plaintiffs, at the request of the [* 477] defendants and of the said *Payson*, had before that * time, on the same day, delivered the same tickets to said *John Gardner*, [one of the defendants and] one of said managers, promised the plaintiffs to pay them the same sum on demand. — And for that the defendants, with one *Phillips Payson*, since deceased, at, &c.,

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on, &c., in consideration that the plaintiffs had on the same day, at the special instance and request of the defendants and of said *Payson*, delivered to them prize tickets in the *Harvard College lottery*, which by law entitled the plaintiffs to receive from the defendants one other sum of 1392 dollars, promised the plaintiffs to pay them the same sum on demand. — There was also a count for money had and received by the defendants to the use of the plaintiffs.

The action was tried at the last November term in this county, upon the general issue of *non assumpsit*, before *Parker*, J., who reports the following facts as proved at the trial: —

The defendants, with *Phillips Payson*, deceased, were duly appointed managers of *Harvard College lottery*, agreeable to a contract in the case between them and the corporation of the college, dated June 16th, 1806.

On the 6th of January, 1809, the plaintiffs having, as their own property, a number of tickets in the fourth class of said lottery, among which were prizes to the amount of 1392 dollars, all of which tickets were signed by the defendant *Gardner* alone, delivered the same to the said *Gardner*, without receiving any money from him, taking his receipt therefor as follows, viz: — "Boston 6 Jan., 1809. Received of Mess. *Gilbert & Dean* prize tickets in *Harvard College lottery*, amounting to thirteen hundred and ninety-two dollars, to be paid them on demand.

"*John Gardner*, Manager."

All the managers had joined in advertising the scheme of the fourth class of the lottery. Tickets were signed severally by the managers; and a separate account was kept by each with the treasurer of the college; and on the 25th of March, 1811, an account was settled between the * treasurer and Mr. [* 478] *Tillinghast*, (one of the defendants,) in which the latter was allowed a credit for prize tickets signed by *Gardner*, according to *Gardner's* receipt to him. The corporation of the college declined to be answerable for any claims the plaintiffs had on *Gardner*.

Before the plaintiffs delivered these tickets to *Gardner*, they applied to Mr. *Payson*, to be allowed the amount of the tickets, who replied, that there would be no difficulty in getting the money of *Gardner*. The treasurer of the college stated that he settled an account with *Gardner* in July, 1810, and that in settling, each manager produced his prize tickets, and was credited for the amount of them. A separate bond was given by each manager to the college. The fourth class was finished drawing July 20th, 1808; and by the scheme prizes below 100 dollars were payable in thirty

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days, and those above that sum in sixty days after the drawing was completed.

A verdict was taken for the plaintiffs by consent, to the amount of the tickets and interest, which was to be set aside, and a nonsuit entered, if, upon the above facts, the opinion of the Court should be, that the managers were not all liable in law.

The cause stood over to this term for argument; and now,

Bigelow, for the plaintiffs, contended that the managers of the lottery were jointly responsible to the holders of prize tickets. They advertised jointly, and it was not known that they severed in giving bonds, or in accounting with the college, for whose benefit the lottery was instituted. They signed the tickets promiscuously, nor did a purchaser of a ticket ever consider himself dependent, for any prize his ticket might draw, on the personal ability of the individual manager, by whom such ticket might be subscribed. The money which the plaintiffs demand in this action is the amount of prizes dawn against the tickets held by them. It is true they lodged the tickets with Mr. *Gardner*, and took his acknowledgment for them; but they were still payable by any or all of [* 479] the managers. Nor can it be * presumed that the plaintiffs, without any possible motive, should have intended to exchange a valid claim against all the managers for the responsibility of one only. Mr. *Gardner* signed the receipt to them as *manager*, or as one of the persons who were jointly liable. And if this receipt should be considered as entitling the plaintiffs to an action against him personally, yet it does not merge the original joint promise of the managers. (1)

Jackson, for the defendants, did not controvert the position, that all the managers were originally liable for the payment of prizes in the lottery; but he insisted that in the present case, when the plaintiffs gave up the prize tickets in their possession to *Gardner*, and took his personal security for the amount due on them, they gave up their right of action against the managers, and gave a new credit to *Gardner*, who thus became accountable to them, instead of the managers jointly. It may reasonably be supposed from this transaction, that there existed a private account between *Gardner* and the plaintiffs, on which the latter might be indebted to the amount of these prizes. The managers and the college were obliged to allow to *Gardner* this amount, on his producing the tickets; he was discharged for that sum, and if this was all he was answerable for, his bond was of course cancelled.

(1) 1 *Burr.* 9.—1 *W. Black.* 65.—1 *Chitty on Pleading*, 34.—5 *Esp. Rep.* 122 — 1 *Esp. Rep.* 129.—*Ibid.* 246.—3 *East's Rep.* 147.

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By the Court. This case must be decided on the particular facts reported by the judge. There can be no question, that the managers were jointly responsible to the plaintiffs, while they retained the prize tickets, which constituted the evidence of their demand But when the plaintiffs delivered the tickets to Mr. *Gardner*, and took his personal promise for the amount due upon them, they relinquished their claim on the other managers, and lost their remedy on the tickets; having exchanged it for a right of action against *Gardner*. The verdict must be set aside, and the plaintiffs be called

Plaintiffs nonsuit.

[*480]

*BENJAMIN RUGGLES *versus* JOSEPH PATTEN.

In an action against one of several joint promisers in a note of hand, it is no bar that one of the promisers other than the defendant has paid his share, and been discharged by the promisee.

It is no bar to an action on a promissory note for the payment of money at a day and place certain, that the holder of the note was not present at the time and place fixed for payment.

ASSUMPSIT by the endorsee against the maker of a promissory note. — The declaration contained three counts.

The first count alleged that the defendant, at *Columbia*, on the 8th of October, 1808, by his note of that date, in writing, by him subscribed, for value received, promised one *Thomas Ruggles*, to pay him, or his order, 1500 dollars at the *Penobscot* bank, kept at *Bucks-town*, in four months, with interest after that time; and the said *Thomas*, afterwards, on the 1st day of May, 1810, by his endorsement, &c., ordered the contents of said note, then due and unpaid, to be paid to the plaintiff, for value received of him; of which the said *Patten* then and there had notice, whereby he became liable, and in consideration thereof promised the plaintiff to pay him the same accordingly.

The second count was like the first; with an additional averment that the said *Thomas Ruggles* was ready, at the said *Penobscot* bank, on the day the note became due, to receive the said sum and interest, and then and there demanded the same.

The third count was for 2000 dollars, money had and received by the defendant to the plaintiff's use.

The defendant pleaded, 1. The general issue to all the counts in the declaration, which was joined.

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2. In bar to the first and second counts, that the promises therein mentioned, if any such were made, were made by the defendant, jointly with *Samuel Bucknam*, *Thomas Low*, *Ichabod Bucknam*, *William Bucknam*, and *Thomas Wood*; and that on the 29th day of March, 1809, in consideration of 378 dollars received of the said *Samuel Bucknam* by the said *Thomas Ruggles*, then the payee and holder of said note, and before the transfer of the same to the plaintiff, the said *Thomas Ruggles* did exonerate, acquit, and discharge the said *Samuel*, and also the other promisers, from any further payment in consequence of the breach of the promises in the said first and second counts mentioned,
[* 481] *and from all further performance thereof; and this, &c., wherefore, &c.

3. The third plea is also in bar to the first and second counts, and contains the same averments as the preceding one, except that it alleges the payment of 378 dollars by *Samuel Bucknam* to the payee, to have been made and received in full of said *Samuel's* quarter part, and that the payee did then and there exonerate, acquit, and discharge the said *Samuel* from any further payment of the same note; and concludes with a verification.

4. In bar to the second count, protesting that the defendant, on the day said note in the second count mentioned became due, was ready and willing to pay to the said *Thomas Ruggles* the contents thereof at the *Penobscot* bank, kept in *Buckstown*, according to the tenor of the promises in the said second count mentioned, avers that the said *Thomas Ruggles* was not then ready or present at the said bank to receive payment thereof; and did not demand the same of the defendant, as the plaintiff in his second count has alleged; and tenders an issue to the country.

The plaintiff replies to the second plea, that the said *Thomas Ruggles* did not exonerate, acquit, and discharge the said *Samuel Bucknam* and the other promisers from any further payment, &c., and tenders an issue to the country, which is joined by the defendant.

To the third plea the plaintiff demurs generally, and the defend ant joins in demurrer.

To the fourth plea the plaintiff also demurs, and assigns the following causes of demurrer, *viz.*: — 1. Because the matter alleged in the *protestando* is not alleged or suggested in the declaration. — 2. Because the plea concludes to the country, when it ought to conclude with a verification. — 3. Because it traverses and offers to put in issue an immaterial fact. — 4. Because it is informal, untechnical, and defective. And the defendant joins in demurrer.

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*The issues in fact having been found for the plaintiff, the action came on at this term to be argued on the demurrers. [* 482]

The Solicitor General, in support of the demurrer to the third plea, contended that the discharge of one of the joint promisers was no discharge of the others. It amounts to nothing more than engagement not to sue the particular promiser. (1) It is not a release, because not under seal. It cannot be pleaded as payment, because it is not in full of the promise; nor, for the same reason, is it good by way of accord and satisfaction.

Fuller for the defendant. This appears from the record to be a joint promise; and a release to one is a release to all in debt, or covenant, as well as in trespass. (2) Modern authorities have relaxed the principle, that a release must be in all cases by deed. It is sufficient if the discharge be of as high a nature as the obligation. Thus a parole discharge of a parole engagement is good. (3)

The Court called on *Fuller* to support his fourth plea; and he insisted that the issue he had tendered was on a fact material, which was averred by the plaintiff. If the payee of a note payable at a place and day certain is not at the place, it cannot be material whether the promiser be there or not, since he could not have paid the money. (4)

The Solicitor General. It was the duty of the debtor to seek his creditor. On a promise to pay money no demand is necessary. (5) The neglect of the creditor to be at the place where the debt is made payable is not a discharge of the debt.

By the Court. This is an action of *assumpsit* brought by the endorsee against one of several joint promisers in a negotiable note for the payment of money. The defendant pleads in bar, that one of the joint promisers, other than himself, had paid his share or proportion of the money promised to the promisee, before the note was assigned, and that, in consideration thereof, the promisee had acquitted all the promisers from any further demand on the note. As the promise appears from the record to have been joint, if the defendant would avail himself of that fact, he should have shown it as matter in abatement. A payment of part by one promiser cannot operate a discharge of the rest. [* 483]

In a fourth plea the defendant says that the holder of the note was not present at the time and place appointed for payment But this is no bar to an action on a promise to pay money; and the

(1) *Salk.* 475. — *Cro. Car.* 551. (2) *Co. Lit.* 232, *a.* (3) 2 *Wils.* 86, 376.
(4) 1 *Saund.* 103, *note* (3.) — *Doug.* 690. — 1 *D. & E.* 638.
(5) 1 *Wils.* 33. — 1 *B. & P.* 59, 60. — 1 *Saund.* 33.

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issue tendered was therefore an immaterial one. The pleas in bar are insufficient; and let judgment be entered on the verdict.

THOMAS ASPINWALL, Administrator, *versus* JOSEPH BARTLET.

Where there was a contract by the master of a ship in a foreign country for the sale of the ship, and a delivery in pursuance of such contract, with an agreement that the new employers should victual and man her, the former owners were held not liable for the wages of the seamen accruing after the contract.

THIS action was *assumpsit* against the defendant as owner of the ship *Herald*, for wages due the plaintiff's intestate, *Tobias Butler*, as a mariner in a voyage from *London* to some port in *Spain*, and from thence to *South America*, and back to *London*.

At the trial, which was had upon the general issue at the last November term in this county, before *Parker*, J., it was in evidence, that *Butler* shipped as a mariner in *London*, on the 21st of December, 1807, and went in the ship to *Corunna* in *Spain*, and from thence to *Rio de la Plata* in *South America*, where he was turned ashore by one *Stevens*, who acted as master, and was imprisoned there. The ship sailed without him, and returned to *London*.

The ship, when she sailed from *Plymouth* in *Massachusetts* in the fall of 1807, was owned by the defendant, and commanded by *Trueman Bartlet*. On her arrival at *London* the master agreed to sell the ship to a house in *London*, and received the price for her; but not having legal authority to sell, he entered into a charter party with the *London* house, by which they were to have the entire use of the ship, and were to victual and man her.

[* 484] * *T. Bartlet*, the former master, testified that this agreement was executed about the 10th of December, 1807; after which time he had no charge or concern with the ship; that *Stevens*, who had been his mate before, was appointed the master; that neither he, the witness, nor the defendant, his employer, had any interest in the voyage from *London*, nor were concerned in the proceeds thereof; that he had never seen *Butler*, until his arrival at *Plymouth* aforesaid from *South America*, and that he never shipped him, or any other of the crew, for that voyage; and that the contract for the sale of the ship, which he made as before stated, had since been perfected by a regular bill of sale

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forwarded to the purchasers, and that the charter party had been cancelled.

The plaintiff's counsel contended at the trial, that as there had been no legal change of property in the vessel, the papers of the custom-house remaining as before the vessel was contracted to be sold, the defendant, as owner, remained liable for the wages of the crew.

The judge directed the jury, that if they were satisfied that there was a *bonâ fide* sale agreed upon, and a delivery of the ship accordingly, so that she ceased to be under the control of the defendant, he was not liable as owner for the wages of the seamen; and further, that when a vessel is chartered to one, who by the contract is to victual and man her, and the seamen ship after the execution of such charter party, the hirers of the ship are the owners for the purpose of giving the security, which the law contemplates, to the mariners. And the jury returned a verdict for the defendant, which the plaintiff moved to set aside, and for a new trial for a misdirection on the above points; and the action stood continued upon that motion.

Sullivan for the plaintiff. As it is not denied that the wages were earned, nor is it pretended that they have been forfeited, the only question in the case is, whether the defendant is liable for them.

The master ought not to have been permitted to prove the agreement to sell the vessel. That agreement was doubtless * in writing, and ought to have been produced. [* 485] It might have been made subject to many conditions and contingencies, which would give the transaction a very different complexion.

Curia. This point is not saved to you by the report. You should have made the objection at the trial, if you wished to avail yourself of it in this stage of the action.

Sullivan. If parole evidence was admissible, I contend that a mere agreement to sell is not a sale, and until a sale and transfer, the former owner remains liable to the mariners for their wages. They can only know the owner by the register of the ship, and by that the defendant continued the owner until the voyage was completed. The register is the only evidence of ownership recognized in the Courts of Admiralty. (1) So none but the registered owner can recover on a policy of insurance for a loss of a ship; (2) nor on a policy on the freight. (3) Owners are chargeable for neces-

(1) *Rob Admr. Rep.* 155, *The Sisters.* (2) 4 *Esp. Rep.* 98, *Marsh* vs. *Robinson.*
(3) 5 *D. & E.* 709, *Camden* vs. *Anderson.*

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saries furnished the ship by order of the master, although the ship were leased to the master for a term of years. (4) In the case of *Brooks* vs. *Dorr & Al.*, (5) in this Court, it was determined that a seaman was entitled to recover his wages of the owners of the ship, notwithstanding they had parted with all their interest by abandoning to the underwriters.

Whitman for the defendant. The owner is liable to the action of the seamen for their wages, only on account of the privity that exists between the owner and the master, with which latter the seamen immediately contract. In the case at bar, there existed no such privity. (6) *Stevens* was not the defendant's master. The defendant had no concern in the voyage, nor any interest in the ship, or in her earnings during the voyage.

In the case of *Hussey* vs. *Allen & Al.*, (7) decided in this Court, it was determined that the owners of a vessel, who had parted with their property in her during her voyage, in which a merchant in a foreign port had furnished her with necessary supplies, were not liable for those supplies.

[* 486] * *By the Court.* It is generally true that a mariner has a threefold remedy for the recovery of his wages, the vessel, the owners, and the master. But where, as in the case before us, there was an absolute contract to sell, and possession delivered pursuant to that contract, and a part of the agreement was, that the new employers of the vessel should victual and man her for the voyage, such employer is in place of the owner, and is liable for the wages of the seamen. The former owner cannot be also held. *Judgment on the verdict.*

(4) *Cowp.* 636, *Rich* vs. *Coe & Al.* (5) 2 *Mass. Rep.* 39. See also 5 *B. & P.* 182.
(6) *Abbott on Shipping*, *P.* 4, *c.* 4, § 10. (7) 6 *Mass. Rep.* 163.

DANIEL PARKER AND OTHERS *versus* ISRAEL KINSMAN, AND JACOB PEABODY, his Trustee.

A having assigned all his property to *B*, in trust for his creditors, and the same being afterwards taken out of *B's* possession by attachment at the suit of certain of *A's* creditors, *B* was afterwards summoned as the trustee of *A*, in a foreign attachment, and held as such.

THE question submitted to the determination of the Court in this case was, whether, by the answers of *Peabody* to the usual interrogatories, he should be adjudged the trustee of *Kinsman*.

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From those answers it appears that on the 20th of May, 1811, *Kinsman* and *Peabody* executed an indenture, by which *Kinsman* conveyed to *Peabody* his whole estate and effects, in trust that he should convert them into cash, and make a ratable distribution of the proceeds amongst all the creditors of *Kinsman*, who should, within twenty days from the date of the indenture, present their claims, and ratify and confirm the provisions of the said assignment. Immediately upon the execution of the indenture, *Kinsman* delivered the key of his store to *Peabody*, which store contained all the reputed property of *Kinsman*, but no bill or invoice of the goods therein was delivered. *Peabody* locked the store and retired. Within two days after the above transaction, and before any of the goods were removed from the store, but after the service of the summons was made upon *Peabody* in this action, certain creditors of *Kinsman* sued out writs of attachment against him, and thereupon caused the store to be broken open, and the goods therein to be attached, and they were in *the possession [* 487] of the officer at the time of the answers. The assignment purported to be made in consideration of the insolvency of *Kinsman*, his disposition to make a just division of his property among his creditors, and one dollar paid him by *Peabody*. But nothing was in fact given or promised to him as a consideration.

Selfridge, for the defendant, contended that the process of foreign attachment does not lie, except where the goods, effects, &c., cannot be come at to be attached by the ordinary process of law. But here the plaintiff might have seized the goods, as well as those other creditors of *Kinsman*, who afterwards caused them to be attached. If the deed was fraudulent, and therefore void against creditors, the property of the goods remained in *Kinsman*, and *Peabody* was merely his servant, or the keeper of the goods. (1)

Shaw for the plaintiff. The trustee was answerable at the time of the service of this process upon him. He had the custody of the goods. They had been, in the very words of the statute, "intrusted and deposited" in his hands. After the service of the summons upon him, the property was bound thereby; and he not only had a right to keep the possession of them, but it was his duty so to do. He will have his remedy over for them, against the officer who now holds them.

And *the Court*, being of this opinion, decided that *Peabody* was holden as trustee.

(1) See 5 *Mass. Rep.* 303, *Waterman* vs. *Robinson*. — 1 *Binney's Rep* 502

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JONATHAN PEIRCE *versus* THOMAS L. CHASE.

Where a defendant producing a witness had declared that it belonged to such witness to pay the demand sued as well as himself, such witness cannot be sworn.

ASSUMPSIT by the promisee against the maker of a promissory note.

At the trial the defence was, that the note was usurious; and the defendant offered the deposition of *Thomas C. Legate*, to prove that the plaintiff informed him that the note declared on was given for *extra interest* on a certain other note for 1000 dollars, in which the defendant, the witness, and several others, were joint and several promisers. The note last mentioned had been sued, and judgment recovered thereon and satisfied.

[*488] *The plaintiff objected to the witness as interested, and in addition to the foregoing facts, read three depositions which proved that the defendant had declared that it belonged to the witness to pay the note, as much as to himself. The witness himself, being questioned by the defendant, declared in his deposition that he was not interested. The judge, who sat at the trial, admitted the testimony of the witness, and reserved the point for the opinion of the whole Court.

Fuller for the plaintiff.

Smith for the defendant.

By the Court. Proof that a witness has confessed himself interested in the event of a cause is not sufficient to disqualify him. But where it is proved that the party, by whom the witness is introduced, has acknowledged him so interested, the witness ought not to be sworn. As the deposition of *Legate* was therefore im properly admitted at the trial, the verdict in this case must be se aside, and a new trial granted.

THOMAS DAWES, Judge of Probate, *versus* WILLIAM GOOCH.

In debt on an administration bond against a surety, the principal being dead, the defendant pleaded performance generally; the plaintiff demurred because a special performance of each article of the condition was not averred in the plea; the plea was adjudged sufficient.

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DAWES *vs.* GOOCH.

The plaintiff moved for leave to waive the demurrer and reply. This motion was denied, particularly because the bond was of long standing, &c.
In such action, costs were awarded against the party for whose benefit the suit was commenced.

DEBT on an administration bond, in which the defendant was surety for *Martha Leverett*, to whom the judge of probate had committed the administration of the estate of her deceased husband, *Thomas Leverett*. Dated April 20th, 1778.

The defendant, after oyer had of the bond and condition, which were in the usual form, pleads in bar, that the said *Martha* "did well and truly fulfil, perform, and discharge all and singular the matters and things in the condition of the said writing obligatory expressed, on her *part to be fulfilled, per- [* 489] formed, and discharged, according to the form and effect of said condition."

To this plea the plaintiff demurs, and assigns the following causes, *viz.* — 1. That the defendant has not averred, that the said *Martha* made and exhibited an inventory; or, 2. That she well and truly administered, &c.; or, 3. That she rendered any account. 4. That it doth not appear whether the judge of probate ordered any delivery of the goods remaining upon the account to be rendered by the said *Martha*. 5. That it is not alleged whether any last will and testament of the deceased did or did not appear, or was exhibited, &c. 6. That the said plea is a merely general plea of performance, &c., whereas the performance of the several matters, &c., ought to have been specifically alleged, so that the plaintiff could have taken issue thereon.

The defendant joins in demurrer.

Sedgwick, for the plaintiff, cited the authorities in the margin; (1) but perceiving the leaning of the Court to be against him upon the sufficiency of the plea in bar, he afterwards moved for leave to withdraw the demurrer and reply.

By the Court. We do not grant the motion of the plaintiff for leave to replead. It is now more than thirty years since the appointment of the administratrix, for whose faithful discharge of the trust the bond in this case was given. She is now dead, by which any means of a legal and equitable defence, which may have been in her power, may be lost to the present defendant; and thus more mischief might be produced by the best investigation, which is at present possible, than can arise from finally closing the business where it now stands. The defendant's plea is adjudged good; and

(1) 1 *Saund.* 117, *note* 1. — *Bulst.* 43, *Stone* vs. *Bliss.* — 1 *Show.* 1. — 1 *Sidwfin*, 215. — 1 *Lutw.* 419. — 1 *D. & E.* 753.

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let him have judgment for his costs against the person at whose suit and for whose benefit the action was commenced.†

† This judgment for costs against the endorser of the writ was supported by a precedent in this Court, October term, 1789, in *Middlesex*. The action was upon an administration bond by the judge of probate, *Prescott* vs. *Smith & Al.*, and judgmer was rendered for costs against *Elisha Cutler*, for whose use the action was brought.

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*COMMONWEALTH *versus* WILLIAM CARROL.

There is no statute provision for the punishment of the crime of breaking and entering a warehouse in the night time.

THE defendant was convicted at the last November term in this county of *breaking and entering in the night time* a warehouse, with intent to steal, &c. A question being made after the conviction, whether the offence was within the provision of any statute, the indictment was continued to this term for the opinion of the whole Court.

The statute of 1805, *c.* 101, for the punishment of burglary, &c., in the fourth section enacts that if any person, with intent to commit any felony, "*shall in the night time enter without breaking*, or *in the day time break and enter*, any warehouse," &c., every such offender shall be punished, &c.

By the Court. The lesser offence is animadverted upon, while the greater is omitted. The offence, of which the defendant stands convicted is not within the statute; and he must be sentenced as at common law. — He was accordingly sentenced to six months' imprisonment in the common jail of the county.

JOHN RICE AND ANOTHER *versus* JOHN CARNES.

After final judgment, bail cannot surrender their principal in Court.

JUDGMENT having been rendered for the plaintiffs at the last term, and they having neglected to sue out their execution thereon, *Ephraim Locke*, the bail for the defendant, brought him into Court

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and *Hubbard*, in behalf of the bail, moved the Court to order the defendant into custody, or otherwise direct, so that he, the said *Locke*, might be saved harmless from the condition of the bail bond.

Curia. As final judgment has been rendered in the action, the bail cannot surrender his principal in Court. If the plaintiffs neglect to sue out their execution, and obtain a return thereof, so as that their *scire facias* be not served upon the bail within a year from the rendition of the judgment, * the bail will [* **491**] be discharged of course; if execution is sued out, the bail may surrender the principal to the officer having charge of it; or he may wait the return of the *scire facias*, and then make the surrender in Court.

Savage for the plaintiffs.

MARY POPKIN *versus* JEREMIAH BUMSTEAD.

Where the wife joined her husband in a mortgage, relinquishing her claim of dower, and after the death of the mortgagor, the purchaser of the equity of redemption paid the money due on the mortgage, and the mortgagee acknowledged the discharge on the record, it was held that the widow of the mortgagor was barred of her dower.

THIS was a writ of dower, to which the tenant pleaded in bar, that *Thomas Popkin*, husband of the demandant, in his lifetime, *viz.*, on the 30th of April, 1806, mortgaged the premises, in which the said *Mary* demands her dower, to one *Thomas Capen*, for the payment of 3000 dollars, and that the demandant, in and by the mortgage deed, for a valuable consideration, released to the said *Capen* all her right of dower in the mortgaged premises, and did thereby lawfully bar and exclude herself from all her right of dower therein forever; that *Capen* entered and became seised; that on the 9th of November, 1807, (the said *Thomas Popkin* having before that time died intestate,) *John D. Dyer* was appointed administrator of said *Popkin's* estate; and, having obtained license to sell the real estate of his intestate for the payment of his debts, sold the equity of redemption to *Abel Wheelock*, by whom the same was conveyed to *Bumstead*, the tenant; that he, the said *Bumstead*, on the 19th of Sept, 1810, paid to *Capen*, the mortgagee, the whole sum due by the mortgage, the same never having been paid by the mortgagor or his administrator; and that the said *Thomas Popkin* was never seised of the premises, or any part thereof, since the execution of the said mortgage deed.

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To this plea the demandant, after oyer of the several conveyances mentioned therein,† replies that on the 19th of
[* 492] * September, 1810, before she demanded her dower, and more than one month before the commencement of this action, the said *Capen*, the mortgagee, then having the sole right and interest in the said mortgage deed, did personally repair to the office of the register of deeds for the county of *Suffolk*, where the said mortgage deed was recorded, having received satisfaction and payment of all the sums due on the mortgage, and did then and there, in the margin of the record of said mortgage deed, acknowledge that he had received full satisfaction and payment for the premises therein mortgaged, and did quitclaim all his right, title, and interest therein, and did then and there desire that the said record might be discharged, and did then and there sign said discharge and acknowledgment; and said mortgage deed was thereupon cancelled and discharged according to the law in that case made and provided.

To this replication the tenant demurs generally, and the demandant joins in demurrer.

Parker, for the tenant, cited the case of *Fowler* vs. *Shearer*, (1) in which it was decided by this Court that a wife may bar herself of dower, by joining her husband in a deed of conveyance, relinquishing her claim to dower, and putting her seal to the deed; and to show that such a release in a mortgage shall enure to the purchaser of the equity of redemption, he referred to the case of *Masury* vs. *Putnam*, (2) decided by this Court in the county of *Essex*, November term, 1793.

Thurston, for the demandant, agreed that the release by her, set forth in the plea, would bar her as respects the mortgagee, and as long as the mortgage deed was in force. But the release of the dower was conditional, as well as the principal conveyance, and the discharge of the mortgage by the mortgagee or his assigns, was a fulfilment of the condition, and a cancelling of the mortgage. (3) The tenant's claim is as the assignee of the administrator of the mortgagor; as such, his right was to redeem the land by paying the money due, and thus extinguishing the
[* 493] * mortgage. This he did, and at the same time annulled the effect of the demandant's release of her right of dower, which was collateral and coëxtensive with the mortgage.

† The deeds from *Dyer* to *Wheelock*, and from him to *Bumstead*, purport a conveyance of the land, "subject to a mortgage made thereon by said deceased, and other rights claimed, *viz.*, dower by the widow of said *Thomas Popkin*, deceased."

(1) 7 *Mass. Rep.* 14.
(2) *Story's Pleadings*, 359, 360.
(3) See *Stat.* 1793, *c.* 37, § 6.

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But if the tenant were considered as the assignee of the mortgagee, still the demandant has a right to redeem. (4) Neither does it appear that the tenant ever entered under the mortgage. The tenant, however, was not the assignee of the mortgagee.

The conveyances, under which alone the tenant claims, both recognize the claim of dower now set up by the demandant. He purchased the land subject to it, and he paid a consideration accordingly. In fact he redeemed as the assignee of *Dyer*, the administrator of the mortgagor; and if *Dyer* had paid the mortgage, would it be contended that the demandant's claim would not have revived? The tenant resists that claim against all equity, since by the terms of his own purchase it was reserved; and if his plea is supported, great injustice is done to the demandant.

By the Court. It has been contended for the demandant, upon the facts exhibited by the pleadings in this case, that her title to dower has revived, and is as if she had never released it in the deed of mortgage. It would be singular, if when the tenant had paid the money due on the mortgage, and supposed that he had thus perfected his estate, by extinguishing the only encumbrance he knew to exist upon it, he should by that act revive the claim of the demandant, which she had before solemnly renounced under her hand and seal, and which, as he was under no obligation, it cannot be presumed he meant to do.

But the facts produce no such absurdity. When the tenant purchased the equity of redemption, it belonged to him to pay the money due on the mortgage, and thus rid his estate of that encumbrance. Having all the equitable interest in himself, when he had paid the money due by the mortgage, the legal estate followed the equitable interest, and he became seised of the whole fee simple. If this were not the plain, legal operation of the transaction, the law would * construe the discharge of the mort- [* 494] gage by the mortgagee a release of the legal estate by him to the tenant, who had become lawfully possessed of the equitable interest, and from whom the consideration for that discharge flowed, rather than such a mischief should follow.

Replication adjudged bad.

(4) *Fisak's Prec. in Chan.* 137, 138.—2 *P. Will.* 716.—1 *Eq. Ca. Abr.* 219, 220

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JOHN DORR *versus* THE UNION INSURANCE COMPANY.

The *British* orders in council of July, 1808, raising the blockade of the ports of *Spain*, extended to the colonies of *Spain*.

A ship insured, being bound to *China*, was captured by a *British* cruiser for a supposed breach of blockade, and was carried into *Canton* and there detained; afterwards being taken to *Calcutta*, she was there libelled and condemned. — The assured heard of her detention at *Canton*, but did not then abandon: Six months afterwards having advice of the condemnation, he immediately abandoned, and it was held seasonable.

THE declaration in this case, which was in *assumpsit*, contained three counts. The first was upon a policy of insurance, dated June 9th, 1807, for 15,000 dollars, on the ship *Jenny* and appurtenances, and 6000 dollars on her cargo, at and from *Boston*, to, at, and from every port or place to which she might proceed, backwards and forwards, until her return to *Boston*; the time not to exceed 24 calendar months from the date of the policy; at a premium of eight per cent. per annum, warranting eight per cent. By a memorandum at the foot of the policy, it was declared that the company took no risk of illicit trade, nor of trading from one belligerent port to another port of the same belligerent. The second count was for 1500 dollars had and received by the defendants for the plaintiff's use. The third count was for 5000 dollars laid out and expended by the plaintiff for the use of the defendants.

Trial was had before *Parker*, J., at the last November term, when a verdict was taken by consent for the plaintiff on the first and third counts, and for the defendants on the second count, subject to the opinion of the Court on the following case: —

"The defendants made the policy declared on, and the plaintiff was interested in the ship and cargo. The ship sailed from *Boston* in June, 1807, touched at *Gough's Island*, and at the islands of *St. Paul* and *Amsterdam*, but did not trade at either of those places; and arrived at *Port Jackson* in *New Holland* about the
[* 495] last of October, 1807. The * captain and supercargo there sold the cargo, and purchased about eighteen tons of sandal wood, and in February following sailed for the *Fegee Islands*, to procure a full cargo of sandal wood, to be carried to *Canton* for sale. In April following, while proceeding for those islands, the ship met with a sudden squall of wind, which carried away the foremast, and shivered it very much under deck; and also carried away the head of the mainmast, and sundry other spars. They arrived at *Goro*, one of the *Fegee Islands*, about the 17th of

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May, 1808; but not finding any timber there suitable for repairing the ship, nor any goods, they proceeded in three days to another of those islands, where they lay one hundred and fifteen days, collecting sandal wood, of which they took on board about one hundred and thirty tons, having purchased the same of the natives, and paid for it in goods and money. At this place they could not procure any timber or spars suitable for repairing the damage the ship had sustained. They sailed about the middle of September for *China*, intending to stop at the *Marian Islands*, to get spars and water; the master and supercargo deeming it unsafe to enter the *China* seas without repairing the ship, and those islands lying directly in their course. They arrived at *Tinian*, one of the islands, but could not procure any timber or spars for the repairs. They here took in a few barrels of beef and a little water. This island has no settled inhabitants, but is visited occasionally by the natives of *Guam*, a neighboring island, who usually stay there a short time to procure beef. Some of these natives, being there at the time, informed the master that he would probably get spars and timber at *Guam*; on which they proceeded thither, and arrived about the 26th of October, 1808. They there found the necessary timber and spars; but the crew were obliged to cut and prepare them, which occupied them seven weeks. They were not able to get sufficient water at *Tinian*, and went to *Guam* for the sole purpose of procuring water and repairing the ship, and without any idea of trading there; * but, while there, they purchased of the natives [* 496] of the island about two tons of beech de mar, fifteen tons of beetel nuts, and twenty six hundred deer's horns; the whole of which would be worth in *Canton* nearly four thousand dollars.

The island of *Guam* belongs to the king of *Spain*, but there are but three *Spaniards* there, *viz.*, the governor and two priests. There are about three thousand natives. The governor has two ports under his command, and about thirty soldiers, who are all natives. None of the other places, at which the ship had touched as above stated, are held by any of the belligerent powers, excepting *Port Jackson*, which belongs to *Great Britain*. The master and supercargo had not received any intelligence from *America* after their departure from *Boston*, until the capture herein aftermentioned, nor any intelligence from *Europe* of a later date than that which they had at *Boston*. While at *Guam*, they did not hear of any blockade of that island, nor were there any *British* vessels there, undertaking or attempting to blockade it. And they understood from the people of the island, that there had been but one vessel there for four years then past, and that was an *American* vessel. They sailed from *Guam* on the 10th of December, 1808, for *China*,

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and on the 27th of that month, when within a mile of the *Chinese* shore, they were captured by the *British* frigate *Dover*, commanded by Captain *Tucker*, who stated as the cause of the capture, that the ship had been at *Guam*, in violation of the *British* orders in council of November 11th, 1807, by which it was, among other things, ordered, that all places in the colonies belonging to the enemies of *Great Britain* should be subject to the same restrictions, in point of trade and navigation, as if actually blockaded. The ship and cargo were detained in *China* by the captors until the 5th of February, 1809, when they sailed for *Calcutta*, and arrived there on the 4th of April following. The vessel and cargo were then libelled, and on the 7th of June, 1809, were condemned by the *British* Court of Vice Admiralty. The only cause of condemnation [* 497] tion * alleged on the trial, or assigned by the judge in passing sentence, was the violation of the said *British* order, by touching and trading at *Guam*.

On the 4th of July, 1808, the *British* government made an order, declaring that the blockade of all the ports of *Spain*, except such as might be still in the possession or under the control of *France*, should be forthwith raised. This order was produced on the said trial.

On the 5th of June, 1809, the plaintiff received intelligence of the capture, and that the ship was then detained at *Canton*. On the 31st of December, 1809, the plaintiff received intelligence of the said condemnation; and on the next day made an offer of abandonment to the defendants.

The plaintiff appealed from the said sentence, and on the 16th of May, 1811, the same was reversed by the High Court of Appeals in *England*. The vessel and cargo were sold in *Calcutta*, immediately after the said first mentioned sentence. The plaintiff has not received any part of the proceeds. The said appeal was claimed by the master and supercargo at *Calcutta* immediately after the first sentence, and has been prosecuted by the plaintiff since the abandonment, for the benefit of whichever party it may concern. The decrees and orders above mentioned, and also the *British* order in council of the 7th of January, 1807, prohibiting vessels to trade from one port to another, both ports being in the possession of *France* or her allies, were read at the trial, and are referred to as a part of the report.

The plaintiff claimed for a total loss of vessel and cargo: and if this were not allowed, he claimed for a partial loss, on account of certain damages to the cargo, and embezzlement of part thereof alleged to have taken place while in the hands of the captors; and also for the damage sustained by the ship in the storm above

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mentioned; and for all such partial loss and damage to the property insured, as the defendants are legally responsible for, to be proved before the assessors hereafter mentioned. He also claimed a contribution for a general average, for the moneys laid
* out and expended by him on the two trials above men- [* 498]
tioned, and other charges.

The parties agreed, that if the Court should be of opinion, that the plaintiff had maintained his action on the first count, and that he was entitled to recover for a total loss, the verdict on the first count should stand, with additional interest to the time of rendering judgment. — If the Court should be of opinion, that the plaintiff was not entitled to recover for a total loss, then the amount of partial loss, if any be due, should be adjusted by assessors to be appointed by the Court; and the verdict on the first count be amended accordingly. — If the Court should be of opinion, that the plaintiff was entitled to recover for a general average, the amount to be adjusted by assessors as aforesaid, and the verdict on the third count to be increased or diminished according to their award. — And if the Court should be of opinion, that the plaintiff was entitled to recover for a partial loss, in addition to a total loss, then the verdict on the first count was to stand, with additional interest as aforesaid; and the amount of the partial loss be adjusted by assessors to be appointed as aforesaid, and the verdict on the third count made conformable to their award, including also the general average, if any should be due.

The cause was argued at this term upon the foregoing report, by *Prescott* and *Jackson* for the plaintiff, and *Dexter* for the defendants.

Jackson contended that at the time of the abandonment a total loss existed by the condemnation in the Court of Vice Admiralty; and that the abandonment was offered at the proper time. While the ship was detained at *Canton*, which was her port of discharge, the plaintiff, knowing that there had been no contravention of the *British* orders in council, expected with very good reason that she would be delivered up to the master, and therefore properly delayed an abandonment. In such a state of things, and with such impressions on his mind, it would not have consisted with fairness for the plaintiff to throw the voyage on his underwriters.
* But when he received the account of the condemna- [* 499]
tion, he immediately abandoned. He was under no
obligation to wait the issue of the appeal. And while the reversal of the decree in the Court of Appeals shows that the ship had been engaged in no illicit trade, it establishes his right to abandon, at the same time that it favors the defendants in finally reducing the amount of their loss.

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Dexter argued that the facts disclosed no loss within the policy; or rather the whole loss arose from causes within the exceptions in the memorandum attached to the policy; and that if a total loss within the terms of the policy had once existed, yet the abandonment was not seasonably made, and a restoration having been decreed, the plaintiff cannot now recover for a total loss.

The capture and all the subsequent misfortunes arose from the trading at *Guam*, in violation of the *British* order of November 1807. This was illicit trade, as being with a blockaded port. And in this argument it is wholly immaterial whether the order was justifiable by the law of nations or not. Nor does the reversal of the decree of condemnation in the Court of Appeals go at all to disprove the cause or ground of the condemnation. It merely avoids the decree, and may have been produced by causes foreign to the original ground of capture. The decree of condemnation being conclusive evidence of the facts recited in it, and being bottomed on the trading at *Guam* as illicit, it is not competent to the plaintiff to say the trade was lawful. The underwriters are not liable for a loss by condemnation for illicit trade, whether in fact the assured has or has not been engaged in it.

The order of July, 1808, applied only to *Spain* proper, and did not extend to the colonies; it originated from the political changes which were then taking place in that kingdom. If the *British* government had intended to include the colonies of *Spain*, it cannot be doubted that they would have been mentioned in the order.

But whether included or not, it is sufficient for the [* 500] defence of this action, that the * Court of Vice Admiralty did not consider them to be included, and on that grounded the decree of condemnation.

But the plaintiff cannot recover for a total loss, not having made his offer of abandonment within a reasonable time from the account of the loss. The capture constituted the loss; and the condemnation was but a continuance of it. The abandonment was unreasonably delayed, unless the decree of condemnation constituted the loss; but if the condemnation constituted the loss, that being for illicit trade, it was not a loss within the policy. If the condemnation gave no right to abandon, none has been seasonably made.

Prescott, in reply, contended that the case did not show that there had been illicit trade within the intent of the parties to the policy. This phrase is always used for a trading in breach of the revenue or other municipal laws of the place where the trade is carried on; it is synonymous with smuggling or an interloping trade, and is never applied to a breach of a blockade. Such is the popular use of the phrase, and such is the technical description of the thing, as

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given by this Court in the case of *Richardson & Al.* vs. *Maine Insurance Company.* (1) The stopping and trading at *Guam* was then not carrying on an illicit trade, but was a breach of a construc tive blockade, if the orders in council can be supposed to extend to so insignificant a place, as the facts show this island to have been.

The orders of July, 1808, were intended as a repeal of the previous orders of November, so far as they related to *Spain* and its dependencies. They must therefore have been intended to be coëxtensive with the former. Such seems the necessary construction. But if the latter orders had never been issued, yet the entire change of the political relations of *Great Britain* and *Spain* would of itself have operated the repeal of the first orders.

The reversal of the decree of the Vice Admiralty Court, and the decree of the Court of Appeals for a restoration of
* the property, is conclusive proof that there never was [* **501**]
a good cause of condemnation. It falsifies the condemnation, and the grounds of it. It proves either that *Guam* was never within the first orders, or that it was included in the rescinding orders, or that the alliance between the two countries *ipso facto* raised the blockade, which had previously existed.

The abandonment was made in good season. When the account of the detention of the ship was received, she was known to be at her port of destination. The owners did not think there was any hazard of a condemnation; and although they then had a right to abandon, they had also a right to wait for further information. When this came, and the ship had been taken out of the course of her voyage to a distant port, and there condemned, the property was gone from them, a total loss had taken place, and they immediately made the abandonment. The appeal was interposed for the benefit of all concerned. If the appeal had not been made, no abandonment would have been necessary. But the appeal cannot have an *ex post facto* operation, in altering the plaintiff's rights, which were fixed by the condemnation.

By the Court. Two objections are made to the plaintiff's right to recover in this action. The first is, that the ship was concerned in illicit commerce, by trading at the island of *Guam*, which belonged to the crown of *Spain*, whose territories had been declared by the *British* orders in council in a state of blockade. But it is very apparent that the posterior orders revoking the blockade of *Spain* were intended to extend to the colonies in her possession, and that the blockade of *Guam* was raised before the ship in this case arrived there. It is true the decree of condemnation in

(1) 6 *Mass. Rep* 102.

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the Court of Vice Admiralty was bottomed on the supposed fact of a breach of blockade; but the reversal of that decree shows it to have been made illegally, and without sufficient foundation.

[* 502] * The other objection is, that the abandonment was not made within a reasonable time after the account of the loss was received. But the account received was merely of a seizure and detention for a cause, which the owner here knew did not exist. It was not his duty to abandon under such circumstances. After the condemnation was known to him, no delay in offering to abandon is imputed to him. He is then entitled to recover for a total loss on the first count. The case does not furnish evidence to entitle the plaintiff to recover a partial loss, beyond the total loss; but the expenses incurred by him on the two trials in the Courts of Admiralty constitute a general average, the amount of which must be ascertained by assessors, and the verdict amended accordingly; and upon the verdict so amended let judgment be entered up, with costs for the plaintiff.

SULLIVAN DORR *versus* THE UNION INSURANCE COMPANY.

A policy of insurance contained the following memorandum, "*In case of capture, or restraint, the assured is not to abandon, until the property is condemned, or until it shall have been proved to have been ninety days under detention.*" — The property was seized and had been detained more than ninety days, when the assured first heard of the seizure, who thereupon abandoned to the underwriters; but at the time of the abandonment the property had been restored to the agent of the owner; and it was held that the underwriters were not bound to accept the abandonment.

THIS was an action of the case upon a policy of insurance, by which the defendants insured for the plaintiff 11,700 dollars on 190 chests of black tea on board the ship *President Adams*, at and from *Boston* to *Tonningen*, with liberty to touch at *Heligoland* for information, and a pilot.

The policy was made on the 7th of November, 1809; and at the foot of it was the following memorandum, *viz.* "In case of capture or restraint, the assured is not to abandon, until the property is condemned, or until it shall have been proved to have been ninety days under detention."

The cause was tried upon the general issue, at the last November

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term in this county, before *Parker*, J., from whose report of the trial the following facts appear.

The vessel sailed from *Boston* on the voyage insured, the property of the plaintiff; and on the 22d of December, *1809, having arrived in the river *Eyder*, near to said [* 503] *Tonningen*, the vessel with the tea on board was seized and restrained by certain officers of the king of *Denmark*, and by them detained until the 27th of April, 1810, and on that day was restored to the agents of the owners.

On the 2d day of June following, the plaintiff having received intelligence from a person, who left *Tonningen* on the 26th of March, that the tea then remained under detention; but not knowing of the restoration of the same, offered to abandon all his right and title in the same to the defendants, who refused to accept the same. This offer was within a reasonable time after the plaintiff received the intelligence of the restraint.

A verdict was taken by consent for the plaintiff, as for a total loss, which was to be set aside, and a nonsuit entered, if the Court should be of opinion, that upon these facts the plaintiff had not a right to abandon.

Jackson, for the plaintiff, argued that the memorandum added to the policy in the case, gave the assured an absolute right to abandon, when the property insured shall have been detained ninety days. The clause was intended to avoid all question of the actual state of the fact at the time, to fix the rights and duties of the parties by the detention for the space of ninety days. One good effect contemplated from this agreement is, that the right of abandonment being put out of question, the underwriter may without hesitation accept the abandonment, and take measures for preventing a waste and loss of the property insured, which often happen when any uncertainty attaches to the right of abandonment. The plain import of the memorandum is, that if after the expiration of ninety days from the capture, the property shall still be detained, the right of abandonment shall be fixed.

Dexter for the defendants. The memorandum in question was introduced into our policies from the present state of commerce, when detentions are so frequent without legal cause; and its object was to restrain for a time the right of * the as- [* 504] sured to abandon for that cause, which he would otherwise have had immediately. A very improper effect had grown out of insurances without this restriction; by which underwriters became in fact answerable for the badness of markets. It was intended by the clause in question to protect the underwriter in some measure from this injurious effect; and in no way to enlarge or

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extend the right of the assured to abandon. If the intention had been, as is contended, for the plaintiff, the clause would have been in the affirmative.

By the Court. The only question before us in this case, is whether the plaintiff had a right to abandon, at the time when his offer was made and refused. The plaintiff's counsel has argued that the right of abandonment was enlarged by the memorandum at the foot of the policy. But we are satisfied that the right is thereby restrained. The assured is not to abandon for the cause of detention until ninety days after the capture; nor at the expiration of that period, unless the facts then existing give him a right to abandon. We are therefore all of opinion that the plaintiff had not a right to abandon, when he made the offer to the defendants; and that the verdict must be set aside, and the plaintiff become nonsuit.

Plaintiff nonsuit.†

See 4 *Cranch's Rep.* 29, 202.—3 *Binney's Rep.* 287.—10 *East*, 329.

DAVID WELLS *versus* SAMUEL R. GREENE AND TRUSTEES

An agent of a fire insurance company established in a foreign country having executed a policy, on which a supposed loss has arisen, is not therefore the trustee of the assured.

THE question before the Court in this action arose on the answer of *Joseph Otis*, who was summoned as one of the trustees of *Greene*, the principal defendant.

He stated that he was agent of a copartnership in *London* in the kingdom of *Great Britain*, called "*The Phœnix Assurance Company of London*," and was duly authorized by them to sign and seal policies of assurance in their behalf, the said policies to be accompanied with certain conditions prescribed by the company: — that on the 8th * of March, 1811, he signed and sealed, in his said capacity, a policy insuring from loss by fire, for one year from the date, the sum of 8000 dollars on the stock in trade of the said *Greene*, consisting of English goods in a certain store in *Boston:* that on the 4th of April following the said store took fire, and a part of the goods insured were damaged or consumed; that *Greene* had not in *Otis's* opinion conformed to

[* 505]

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the conditions of the insurance, by giving notice and making proof thereof in the manner prescribed in the conditions; that he (*Otis*) did not believe himself authorized, under the circumstances, to pay the whole or any part of the sum assured; that he was not owner of any of the stock or funds of the said company or the profits thereof, nor bound to pay any part of the said loss, except from the funds of said company; that *Greene* had demanded of him payment of the said loss, but no part of it had been paid; and that since the commencement of this action he had received orders from his constituents not to pay the same, until *Greene* should exhibit a detailed account of the nature and particulars of his loss, &c.

Prescott for the plaintiff.

The Solicitor General for the trustee.

By the Court. Mr. *Otis* is simply the agent of persons in a foreign country. He contracted in that character with the defendant. He disputes the claim of the defendant on behalf of his principals, and acknowledges nothing due from them to *Greene*. The demand of *Greene* is upon the copartnership in *London*, and if he had by action maintained that demand, and recovered a judgment against the copartnership, it would not follow that *Otis* was answerable as his trustee. Indeed, no state of facts, which could arise out of the transaction stated by him, could fix him as trustee of *Greene*.

Trustee discharged.

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* JOHN RICHARDS, Administrator, *versus* JOHN DUTCH AND ANOTHER.

Parole evidence of declarations made by a testator before or after making his will are not to be received in explanation of his intentions in any bequest contained in his will.

Where administration is granted here, upon a will proved in a foreign country pursuant to the statute of 1784, *c.* 12, the administrator may be holden to pay the testator's debts to creditors here, but not to pay legacies, for which the legatees must resort to the country of the testator where the will was originally proved.

THE declaration in this case, which was in *assumpsit*, contained two counts. The first was on a promise of the defendants to account, as bailiffs and receivers of *James Murray*, late of *Calcutta*, deceased, (whose administrator, with the will of the deceased

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annexed, the plaintiff is,) for certain goods shipped to the defendants from *Calcutta* by the said deceased. The second count was *indebitatus assumpsit* for money had and received.

The cause was tried upon a review before *Parker*, J., at the November term, 1809, upon the general issue, and also on an issue joined by the parties on a fact specially pleaded by the defendants, *viz.* That the goods and merchandise, which the defendants had received by assignment from *Murray*, were by his last will and testament bequeathed to them.

It was proved that merchandise to a large amount was, on the 11th of September, 1806, shipped by *Murray* on board the ship *Boston Packet*, then at *Calcutta*, bound to *Salem*, and that said merchandise was consigned by *Murray* to Mess. *Dutch & Deland*, the defendants, who were merchants and partners in trade in *Salem*. The property so consigned came to the hands of the defendants, who sold the same; and the proceeds, according to their account of sales, were 21,547 dollars 62 cents.

The defence was founded upon a claim under the last will and testament of said *Murray;* the defendants contending that the property shipped to them as aforesaid was by said will bequeathed to them for their own use, and that they therefore ought not to be held accountable for the same. The clause of the will, on which they relied, was as follows, *viz.* "*All my property, which has been remitted home by me from this country to* America, *I desire may remain in the hands of those to whom I sent it, for* [* 507] *their own use.*" — A subsequent clause in the will was, "*The property now going to* America, *I do not consider as belonging to any person.*"

It appeared that the testator was a native of *Rhode-Island*, of the name of *Lillibridge;* that he left this country in early life, and after having been some time on board a *British* vessel of war, that he entered the service of some of the princes in the *East Indies*, in which he amassed a large property; that he afterwards went into the service of the *British* in *Bengal*, in which service he continued until his death, which took place in the autumn of 1806 at *Calcutta;* that he was reputed to be possessed of property worth from 150 to 200 thousand dollars, having no family or relations in that country but a wife. Before his death he had determined to come to *America*, and to transport hither all his property. For this purpose he had endeavored to contract with Mr. *Cabot*, supercargo of the ship *Dromo*, then at *Calcutta*, to take him, his family and property on board; but not agreeing upon terms, he applied to *George Dutch*, master of a ship belonging to the defendants, who arrived there

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about the first of July, and who agreed with him, as will hereinafter appear.

The *Boston Packet*, on board of which the goods were shipped, which were consigned to the defendants, had dropped down the river on her way to *America* on Sunday the 20th of September, 1806, of which the testator on that day had knowledge. In the afternoon of the same day, *Murray* fell from his horse, and on the next Tuesday evening died. On the afternoon before his death he sent for Mr. *M'Lintock*, (one of the house of *Alexander & M'Lintock*, who had been his bankers, and with whom the principal part of his fortune was deposited,) to make his will, having been told by those around him that his death was approaching.

There was no evidence that *Murray* had ever before sent any property to *America;* but two witnesses testified that, when conversing about the shipment in the *Boston Packet*, a few days before he fell from his horse, he had de- [* 508] clared that it was the first property he had ever shipped to *America*. *Murray* had no acquaintance with the defendants, nor had he any correspondence with them before he consigned his shipment to them; nor had he ever seen the said *George Dutch*, the brother of one of the defendants, who was admitted to testify in the case, until their meeting in *Calcutta* on *Dutch's* arrival there about the first of July, 1806.

The said *George Dutch* testified, that he arrived at *Calcutta*, master of a ship belonging to the defendants, and there met with *Murray*, who engaged him to receive him with his retinue and property on board his ship, and transport them to *America;* that the witness incurred considerable expense in altering and fitting his ship, particularly the cabin, for the accommodation of *Murray;* that one *Quero* was desirous of shipping a large amount of property by him, and taking passage for *America;* but that *Murray* would not consent, and said that if the witness had any thing to do with *Quero*, he, *Murray*, would not go with him; adding that the witness would lose nothing by him, if he did not take *Quero;* that the witness shipped the goods for *Murray* on board the *Boston Packet*, and entertained him and his suit, consisting of twelve or fifteen persons, at his house in *Calcutta* for three months; *Murray* having at that time a house in the country, at which he lodged, but was frequently in the city, having hired a store or warehouse next to the house occupied by the witness; that *Murray* had advanced the witness 10,000 dollars, for which the witness had drawn a bill on himself payable in *America*, which bill *Murray* had in his possession when he made his will, and when he died; that on this bill an action had been brought by the present plaintiff, and the witness

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disputed payment of the same, on the ground that it was intended by the testator by his will to bequeath it to him; but judgment had been rendered in the action against the witness.

[* 509] * This witness also testified that he was at *Murray's* house on the day he died, and was frequently in his chamber both before and after he made his will; that he knew *Murray* had sent for *M'Lintock* to make his will; that he could not distinctly hear the conversation between *Murray* and *M'Lintock*, but that after the will was signed, *Murray* beckoned to him, and he went to his bedside, when he told *Murray* he had put his owners to great expense and loss to accommodate him, and asked him how he expected to compensate them; that *Murray* replied, *he had given them the property in the Boston Packet.* The witness also testified that *Alexander* and *M'Lintock* were strangers to him. It appeared also by the testimony of the witness, that he had invested his owner's property in a certain cargo, and had by means of credit obtained at *Calcutta* a full freight.

Captain *Emery* testified that *M'Lintock* told him that his house had in their hands property belonging to *Murray*, worth from 150 to 200 thousand rupees.

Col. *Boyd* testified that he was acquainted with *Murray* in the *East Indies*, and that he frequently spoke to him of his relations in *America* with affection and kindness, and heard him say, that when he should acquire property enough, he intended to return to his friends; that it was easy and safe for those in the interior to remit property to *Europe* or *America* by means of the bankers in *Calcutta*, there being regular mails to the sea-coast. There was also some evidence of *Murray's* having spoken of his relations with indifference and contempt.

It appeared that in the former trial of this cause, *George Dutch* was sworn and examined as a witness, but did not then testify respecting any conversation with *Murray* after he had executed the will, nor was it suggested to the Court at the trial, that he could testify to that fact. He stated at the last trial that he was sick when he gave his testimony before, (being at the last trial in a very feeble state of health,) and that at the former trial he

[* 510] was not called * upon by the course of the proceedings to complete his relation.

It was also mentioned and relied on against the credibility of this witness, that from the testimony of Mr. *Cabot* and of a Captain *Breck*, it appeared that his acquaintance with *Murray* had not been so long as he had stated, and that *Murray*, instead of living with him, had only refreshed himself at *Dutch's* house, having his own establishment in the country within a few miles of the city.

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On the part of the plaintiff, all the parole testimony, and particularly that of *George Dutch* tending to prove the intention of the testator to give by his will the property in question to the defendants, was objected to; but the objection was overruled, and the jury were permitted to consider all the parole testimony in the case. They returned a verdict for the defendants on both issues; the foreman having stated that he was requested by the jury to inform the Court, that they had made up their opinions without considering the testimony of *George Dutch* relative to the conversation with *Murray*, after the making of his will; but had considered the other parole testimony in the case.

After the verdict was returned, the plaintiff moved that it be set aside, and a new trial granted, on the report of the judge, before whom the cause was tried, for the following reasons, which were reduced to writing, and filed in the action.

1. "Because certain parole evidence offered by the defendants, and objected to by the plaintiff, was admitted by the judge, to prove the construction of the clause in the will of the said *Murray*, under which the defendants claim to hold the property in question, and the intention of the said testator in that behalf; and more especially that evidence was so admitted of the conversation of the testator, both before and after making his said will, a short time before his death, and at sundry other times, to prove his meaning and intention in the clause aforesaid.

*2. Because the plaintiff was surprised by certain [* 511] evidence produced by the defendants; in that one *George Dutch*, a witness sworn and examined on the part of the defendants, testified to certain conversation said to have taken place between him and the said *Murray*, which appeared to be more essential and material than any other part of his testimony; which had never been mentioned to the plaintiff or his counsel, nor in any manner known to them, until it was so sworn to on the stand; although the said *George Dutch* was sworn and examined on the former trial of this cause, on which occasion he did not mention the said conversation. And if the plaintiff had known or supposed that the said *George Dutch* was to testify to such a fact, he might and would have been prepared to disprove the same, and wholly to defeat the effect of such testimony.

3. Because the defence relied on by the said *Dutch & Deland*, even if true in fact, is wholly insufficient in law, to discharge and acquit them from the payment of the sum demanded in this action; and therefore, as the counsel for the said *Richards* humbly apprehend, the jury ought to have been instructed to find a verdict for the said *Richards* on the general issue

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4. Because the verdict was altogether against the weight of evidence in this case, and the law applicable thereto."

The cause was argued upon this motion, March term, 1810, by *Otis* and *Jackson* for the plaintiff, and *Dexter* and *Prescott* for the defendants.

Jackson. It is among the best established rules in the construction of wills, that parole declarations of testators, to control the import of the will, or give a meaning to the words, which they would not otherwise bear, are inadmissible; and this whether such declarations apply to the devise or to the person of the devisee. (1) Otherwise witnesses might make a parole will for the testator, instead of his own written one. It often happens that a testator has a desire to conceal from those about him the purport [* 512] * of his will until after his death; and with this view he may intentionally hold out a false show, in order to mislead them in their conjectures.

If the person to take be not in some sort described in the devise, no averment can be admitted to show who was intended; and the reason of this principle is, that in such case the ambiguity appears on the face of the instrument. (2)

In support of the second ground of the motion for a new trial, the deposition of *John Lathrop*, jun. Esq. was read, in which the deponent stated that he was resident at *Calcutta* at the time of *Murray's* death, that he was well acquainted with him and the friends with whom he associated; and detailed many circumstances tending to throw a doubt upon the testimony which *George Dutch* gave at the last trial of the cause. Mr. *Richards*, the plaintiff, also filed his own affidavit, stating his expectation of procuring evidence for a new trial, which should invalidate *Dutch's* testimony.

Upon the third ground of the motion, *Jackson* contended that it was not competent for the defendants in this action to set up their claim to a legacy. If the bequest to them were established, stil they have no right to retain the legacy against the present plaintiff, who is answerable to the creditors for the amount. It belongs to the Probate Court to have an account from the plaintiff of all the personal property of the testator within the Commonwealth, that it may be ascertained whether there is sufficient for paying the debts in the first place; although by our statute, (3) a legatee may sue for his legacy at common law, yet this must be after it is made to appear by a settlement in the probate office that there are assets for the purpose.

(1) *Powell on Devises*, 477. — 6 *D. & E.* 671, *Thomas* vs. *Thomas*
(2) *Powell on Devises*, 500. (3) *Stat.* 1783, *c.* 24, § 17

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In this case, however, the plaintiff is merely auxiliary to the executors in *India*. The legacy will never be demandable of him. The will was proved at *Calcutta*, and legatees, perhaps even creditors, must apply there for payment. It cannot be known here that this property is not wanted to pay the debts of the deceased in that country.

* Under the fourth cause shown for a new trial, *Jackson* argued the extreme improbability that the testator [* 513] should exhibit such bounty to absolute strangers, while he gave in the same will small sums to his intimate friends who were about him, including his wife, and to the disinheritance of his near relations, for whom it was in evidence that he expressed a strong affection.

Dexter and *Prescott*. The declaration proved to have been made by the testator, both before and after making his will, were necessary and proper to explain the latent ambiguity, as it respected the persons of the legatees and the thing bequeathed. The expressions were equivocal, and the declarations of the testator were the most proper to remove the doubts arising from them. (4)

Where a party is surprised with unexpected testimony at a trial, his regular course is to suggest it to the Court, and move for a continuance of the action. If he neglects to do this, he implicitly consents to risk the issue with the jury; and ought not afterwards to make it a ground of a motion for a new trial. The doctrine on this subject stands on different ground here from what it does in the English Courts, where our reviews as a matter of right are unknown. If the witness *Dutch*, instead of giving further evidence at the last trial than he had given at the former one, had been first introduced as a witness at the last trial, the plaintiff might have been quite as much surprised at his testimony, yet he would not therefore have been entitled to a new trial. Mr. *Lathrop's* deposition does not disprove the conversation between *G. Dutch* and the testator, for he was not present at the time it is said to have taken place.

This being a bequest of specific property already in the possession of the legatee, amounted to a release of the testator's claim to an account; and the assent of the executor to such a legacy is not necessary. (5) Nor can he take it from the legatees, unless he shows them necessary for the payment of the debts.

The administrator under our statute * cannot have [* 514] greater rights than the principal executor. If the plain-

(4) 1 *P. Will.* 674, 420. — 4 *Vesey, jun.* 680. — 2 *P. Will.* 135. — 7 *Vesey, jun.* 518. — 11 *Vesey, jun.* 543.

(5) *Shep. Touch* 436. — *Godolphin's Orph. Leg.* 275. — *Vin. Abr. Devises, W. b.* 427

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tiff can recover this property, the defendants may immediately sue the plaintiff for it. To prevent a circuity of action, the defendants should be permitted to retain it.

Otis in the close. The parole evidence in this case went rather to create ambiguity than to remove it. The cases in which parole evidence is admitted are, where there are two or more persons of the same name, or where the estate or thing devised is imperfectly described. But we contend that the verdict is against the weight of the evidence, whether properly admitted or not. It is grossly improbable that *Murray* should intend a legacy of this amount for perfect strangers to him, and at the same time omit wholly to notice *George Dutch*, whom he knew, and who pretends to have been on the most intimate terms with him.

The verdict is also against law. Admitting all the evidence to have been regularly admitted, the construction of the will is still matter of law for the Court. It lies then with the defendants to establish their claim to this property to the exclusion of those next of kin to the testator. The latter expression, "the property now going to *America*," must apply to these very goods. There was no other property, to which it can be made to apply. The only consistent construction that can be given is, that by the first clause the testator intended that his executors should not countermand the shipment, but that the consignees should have the benefit of the commissions, as a compensation for the expense and inconvenience they had incurred on his account; and lest it should be construed to mean more than he intended by it, he added the second clause, to show that the goods themselves were not to be theirs.

But even if the defendants were entitled to this legacy, as claimed by them, they cannot retain it in this action. They [* 515] claim it as the bounty of the testator, and it * is highly reasonable that they should go to *India* and there obtain it under the laws of the country, which gave effect to the will. The statute was never intended to give a demand to legatees against an administrator here, who cannot know that the estate is sufficient for the discharge of the debts due from it.

The action stood continued for advisement until this term; and now *the Court* expressed their opinion that the testimony given at the trial, of the oral declarations of the testator, ought not to have been admitted; it went to set up a will by parole, instead of the written will of the testator himself.

In case of a copy of a will filed and administration granted in this state under the statute of 1785, *c.* 12, the administrator may be held to pay debts due to creditors here, if any such are claimed of him; but legatees, who claim only from the bounty of

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the testator, mus' resort to the country of the testator, where the will was originally proved, and by the laws of which his effects are to be distributed, to obtain the bounty they claim.

For both these reasons the verdict must be set aside, and a new trial granted; and upon such new trial the defendants are to be permitted to set off any legal claims they can establish as creditors to the estate of the deceased. (*a*)

(*a*) [Vide *Dawes* vs. *Head*, 3 *Pick.* 128. — *Harvey* vs. *Richards*, 1 *Mass. Rep.* 407, and the remarks of Mr. Justice *Story* upon the case of *Richards* vs. *Dutch*. — ED.]

MARTIN CARROLL AND ANOTHER *versus* THE BOSTON MARINE INSURANCE COMPANY.

None but the assured in a policy of insurance, or their legal representatives in case of their death, can avail themselves of the contract; except in case of the transfer of the vessel, and an assignment of the policy, with the assent of the underwriter thereto, either express or implied.

ASSUMPSIT on a policy of insurance, brought by *Martin Carroll* and *Ebenezer Gay*, Esq. assignee of *Joshua Snow*, a bankrupt. By the policy the defendants assured for the said *Carroll* and *Snow* the sum of 1400 dollars on the schooner *Union* for one year from the 9th day of May, 1801. The plaintiffs declare for a total loss by the perils of the sea within the year.

* At the trial, which was had here at the last Novem- [* **516**] ber term before *Sewall*, J., it was in evidence that the schooner sailed in the month of December, 1801, from the province of *Nova Scotia*, bound to some port in the *United States*, and had never since been heard of.

The defence set up was, that before the loss took place, *viz.* on the 23d of September, 1801, *Carroll* and *Snow* conveyed the vessel by a regular bill of sale to one *Nathaniel Waterman*, who afterwards caused her to be duly enrolled at the custom-house for the port of *Boston* in his name, conformably to said bill of sale.

The judge directed a nonsuit, subject to the opinion of the Court, whether the change of property by the said transfer determined the interest of the assured in the policy declared on.

At the last term it was moved by *Dexter* and *Thurston*, of coun sel for the plaintiffs, that the nonsuit be set aside, and the action sent to another trial; and in support of the motion it was stated,

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that the bill of sale to *Waterman*, though absolute on the face of it, was intended by the parties only as a pledge or security, to indemnify him against a bond, which he had entered into upon a replevin of the vessel, which had been attached, and replevied by *Carroll* and *Snow*. — It was also stated that afterwards, *viz.* on the 11th of November, 1801, *Waterman* agreed with *Snow* for the absolute purchase of his moiety of the vessel, and had paid him for the same; and that on the 6th of May, 1802, three days before the expiration of the policy, *Waterman*, by a bill of sale duly executed, conveyed a moiety of the vessel to the plaintiff *Carroll*.

The action stood over to this term, after an argument by *Dexter* and *Thurston* for the plaintiffs, and *Jackson* for the defendants, and now the opinion of the Court was delivered by

PARKER, J. It being agreed that, in order to entitle the plaintiff to recover, he must prove an interest in the property at
[* 517] the time the loss happened, the only question * is whether the facts, of which evidence was stated to exist, establish that point.

It has been repeatedly decided here that, under the forms of our policies, none but the parties to the contract, or their legal representatives in case of their death, can avail themselves of the contract; although others may in fact have an equitable or even legal interest in the property insured. The only exception to this rule, which has been admitted, exists where a policy has been *bonâ fide*, and for a valuable consideration, assigned, with notice to the underwriter, and an assent on his part, either express or implied. This case does not come within the exception; for here the property assured was, according to the terms of the conveyance between the assured and *Waterman*, absolutely conveyed to the latter, and all the official documents proving the ownership of the vessel were in conformity to this conveyance. (*a*)

But it has been stated in the motion for a new trial, that this was a mere feigned transaction, and that, according to a secret trust and bargain between the assured and *Waterman*, the property was not in truth changed; but merely a lien upon it given to *Waterman*, to indemnify him against a bond which he had executed for their benefit.

We cannot admit the parties to allege facts, which would prove the conveyance fraudulent, to restore them to the rights which they had lost by the transfer. They might have mortgaged the vessel, if security to *Waterman* was alone intended. Every document proves

(*a*) [The claim upon a policy for a loss, after it has happened, may be effectually assigned. *Brichta vs. The Lafayette Ins. Co.*, 2 *Hall*, 372. — ED.]

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an absolute transfer; and these documents must be conclusive in establishing the property of the vessel between the parties.

But *Waterman* is in fact, according to the intention of the parties, made the owner of at least one moiety of the vessel by a subsequent transaction; and he does not convey the other moiety back to *Carroll*, until long after the vessel must have been presumed to be lost; for she sailed from *Nova Scotia* to some port within the *United States* in December, 1801, and this conveyance was not executed until * May, 1802. So that at the [* 518] time the loss took place, *Waterman* was the sole legal owner of the vessel. He cannot recover, because he is not a party to the contract of insurance; nor has it been assigned to him. And the present plaintiffs cannot recover, because at the time of the loss, they certainly had no legal interest in the property insured; nor can an equitable interest be proved, without utterly destroying the character of their own conveyance so *Waterman*.

Costs for the defendant.

LEVI DAME *versus* LUKE BALDWIN

There are no markets overt in this country; and a sale in the public market-place in *Boston*, by one who had feloniously acquired the possession of the article sold, was held not to transfer the property.

THIS was a writ of *replevin* for forty firkins of butter, which had been attached by the defendant, a deputy sheriff of this county, as the property of *Daniel Cook* of *Corinth* in the state of *Vermont*, at the suit of *Robert M. Barnard*, of *Charlestown*, in the county of *Middlesex*.

The cause was tried at the last November term in this county, before *Parker*, J., from whose report the following facts appear.

These firkins of butter were the property of the said *Cook* in November, 1810, and he being desirous to transport them to Mr. *Barnard*, with whom he had had dealings, caused them to be branded with his name, and agreed with one *Harlow* to carry them to *Charlestown*, giving him written directions to deliver them to *Barnard* at the office for the inspection of butter. *Harlow* proceeded ten miles on the road, and then engaged one *Barron* to take the butter on, and delivered it to him for that purpose, giving him the written directions he had received from *Cook*. This was done without the knowledge of *Cook*. *Barron* employed one *Brown* to carry the

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butter, giving him the written instructions aforesaid, which he repeatedly read to him, and also furnishing him with some money to bear his expenses; *Cook* being ignorant also of
[* 519] *Brown's* being employed. * *Brown* sold two firkins of the butter on the way, to pay his travelling expenses, as he said.

When *Brown* arrived in *Boston* with his load, not having carried it to the inspection office, nor having given any notice to *Barnard*, he went to the square in *Boston*, which is the usual and established market-place, and where great quantities of butter and other articles of country produce are sold; and there went to the store of the plaintiff, and offered the butter for sale, assuming the name of *Cook*, and claiming to sell the butter as his own. *Dame* agreed to take it according to the inspection, and it was carried to the inspection office in *Boston*, and *Brown*, under the name of *Cook*, returned to the store of *Dame* with the certificate of inspection, and *Dame* there paid him in bank bills the price of the butter, being 231 dollars 27 cents, taking a bill of parcels therefor, which *Brown* signed with his mark, the name of *D. Cook* being added to the mark by some person in the store.—

The defence was put upon three points.

1. That from the circumstances of the case it ought to be presumed that *Dame* knew *Brown*, or with ordinary caution might have known him; and so ought not to avail himself of the purchase. This was left by the judge to the jury, to decide upon the evidence in the case.

2. That there was no sufficient delivery to *Dame* to complete the sale, the butter having been in the inspection office, when attached by *Baldwin*, and not in the actual possession of *Dame*, and there having been no actual delivery of it to him. The judge ruled this point against the defendant, considering the delivery at the inspection office to be for the use of the plaintiff, after the bargain to sell was made; and especially after the production of the certificate of inspection, and payment of the price, that it was constructively in *Dame's* possession.

3. That there was no authority in *Brown* to sell, and so no transfer of the property; which therefore remained in *Cook*, until the attachment made by the defendant. But
[* 520] * the judge instructed the jury that the trust given by *Cook* to *Harlow*, and so down to *Brown*, to transport the butter to *Charlestown*, although violated by *Brown*, would not authorize *Cook* to reclaim the property from a *bonâ fide* innocent purchaser for a valuable consideration; the sale being of an article commonly found in the market for sale; the carriers of such articles

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generally having authority to sell; and the property being exposed in the usual manner for the sale of such an article.

The jury returned a verdict for the plaintiff; and a new trial being moved for by the defendant, the action stood over to this term on the motion.

Whitman, in support of the motion, contended that there was no legal transfer of the property from *Brown* to the plaintiff. There was no sale in open market; or at least no delivery under such sale. A constructive possession by the plaintiff, which is all that the case finds, is not sufficient in a case where fraud is found. The case finds in effect that the butter was stolen by *Brown*, (1) and of stolen goods there can be no legal sale, except in a market overt, (2) of which we have none in this commonwealth.

Thatcher for the plaintiff. The question on the effect of a sale in open market is presented, in this case, under circumstances the most favorable to the plaintiff. The commodity was exposed to sale in the open and common market, and in the usual manner. The verdict has negatived the idea of fraud or collusion, as between the buyer and seller; nor does there appear any want of reasonable caution on the part of the plaintiff. The sale was public, and the manner of the purchase by the inspector's certificate was the usual and most satisfactory mode, in which sales of the commodity are usually affected; the price was a fair one; and the article such as is usually sold in the market.

At common law all sales of articles vendible in fairs or markets overt, are not only good between the parties, but are binding on the rightful owner. (3)

* The question then arises, — is the market in *Boston* [* **521**] a market overt? — A market overt is a certain place established in any town, under the authority of the supreme power, for buying and selling; and the market in *Boston* is of this character.

In 1633 the following ordinance was passed by the general court of *Massachusetts Bay*. "It is ordered by the authority of this court, that there shall henceforth be a market kept at *Boston*, in the county of *Suffolk*, upon the fifth day of the week, from time to time." (4) And the market place in *Boston* is recognized in sun dry ancient laws of the colony and province.

Brown was the factor or agent of *Cook*, and if he was guilty of

(1) 4 *Mass. Rep.* 580, *Commonwealth* vs. *Brown*.
(2) 1 *Wils.* 9, *Hartop* vs. *Hoare*. — 1 *Leon.* 158, *Gibb's case*. — *Owen*, 27.
(3) 5 *Rep.* 84. — 2 *Bl. Comm.* 449. — 2 *Inst.* 713.
(4) *Gen. Laws, &c. of the Mass. Colony*, 49.

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any fraud or deception, the loss ought to fall on his employer, and not on an innocent purchaser for an adequate consideration. (5)

By the Court. It is beyond a question that the taking by *Brown* was felonious, and therefore a sale by him could not transfer the property. We have no markets overt in this commonwealth. The verdict must be set aside, and a new trial granted.

(5) *Salk.* 289, *Hern* vs. *Nichols.*

WILLIAM HALL *versus* CHARLES CUSHING, Administrator of CHARLES PAINE, ESQ., deceased.

An action against the assignee of a bankrupt does not survive against the administrator of such assignee.

THE action was in *assumpsit*, and was originally brought against the defendant's intestate, as he was assignee of the effects of *William P. Smith*, a bankrupt. The said intestate dying during the pendency of the suit, the defendant was admitted to take upon him the defence of the action.

The declaration contained three counts. In the first the plaintiff alleges that the said *Smith*, as principal, with himself and the said *Paine*, as sureties, on the 20th of February, 1802, became bound in a bond to the *United States* in the sum of 1950 dollars, conditioned for the payment of 1075 dollars on or before the 21st of [* 522] December then next, * being for duties on certain merchandise imported into the port of *Boston* by the said *Smith*: — that afterwards, on the 27th of April, 1802, *Smith* became a bankrupt, and *Paine* was appointed his assignee; and that neither the said *Smith* nor the said *Paine* as his assignee ever paid the said sum, nor any part thereof; and although the said *Paine*, as one of the sureties, on the said 21st of December, paid one half of the sum due; yet he never paid the other half, but the plaintiff as surety as aforesaid became obliged to pay and did pay it. — The second count contains similar averments respecting another bond of the same date, payable on the 20th of February, 1803. — The plaintiff then avers that *Paine* had received from the estate and effects of the bankrupt divers sums of money, amounting in the whole to more than the two sums so paid by the plaintiff, and above whatever sums *Paine* had paid or would be obliged to pay on account of any bonds exe

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cuted by *Smith*, or himself as surety for *Smith*, to the *United States* for the payment of duties: — By means of all which, and of the laws of the *United States*, the said *Paine*, assignee as aforesaid, became liable to pay, &c., of all which he had notice; and in consideration of his liability as aforesaid, promised the plaintiff, &c. — The third count is on another bond to the *United States* for duties on merchandise imported by *Smith*, having been executed by him as principal, and by the plaintiff and one *Francis J. Oliver* as sureties, upon which last bond the plaintiff had been obliged to pay, and had paid the sum of 1919 dollars 25 cents. — Then follow averments similar to those in the preceding counts.

The present defendant pleaded the general issue, *viz.* That his intestate *Paine* never promised, &c., and also in bar that the estate of the intestate being insolvent, and insufficient to pay all the debts which he owed at the time of his decease, commissioners were duly appointed to receive and examine the claims, &c., who reported the amount of the debts due from the estate to be 6998 dollars 7 cents; — and that deducting the allowance made by the Judge of Probate * to the widow of the intestate, with [* 523] the expenses of his last sickness and funeral, and taxes due from the estate, with the expenses of the administration, the balance of the estate in the hands of the administrator was only 1097 dollars 97 cents.

To this plea in bar the plaintiff demurred generally, and the defendant joined in demurrer.

The general issue being joined was tried at the last November term in this county, before *Parker*, J., who reported that, all the facts necessary to entitle the plaintiff to recover being proved, a verdict was taken for him, subject to the opinion of the Court upon the following questions.

1. Whether the action was maintainable against *Paine* in his private capacity, it being proved that effects of *Smith*, the bankrupt, to a greater amount than the damages found by the jury, had come to his hands before the commencement of this suit.

2. Whether the action survives against the administrator of said *Paine*.

3. Whether the effects of said *Paine*, in the hands of his administrator, are bound for the whole amount of the damages found by the jury, notwithstanding the insolvency of said *Paine's* estate, the same being in fact insolvent.

And if the Court should be of opinion, that the action will lie against said *Paine*, and that it survives against his administrator, judgment was to be entered on the verdict; and in such case, if the Court should be of opinion that the priority, given to sureties in

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custom-house bonds by the 65th section of the collection law of the *United States*, obliges the administrator to pay the whole amount of such judgment, execution to issue accordingly: — Otherwise the judgment to be filed with the commissioners on said *Paine's* estate, that the plaintiff may be entitled to his dividend with the other creditors of said estate.

Jackson, for the plaintiff, relied on the 65th section of the *United States'* collection law before referred to, which gives the priority to the *United States* in all cases of the insolvency [*524] * of persons indebted by bond for duties on merchandise imported, and extends that priority to sureties in such bonds, who upon the death or insolvency of the principal shall pay the money due; declaring that "such surety, his or her executors, &c., shall have and enjoy the like advantage, priority or preference for the recovery and receipt of the said moneys out of the estate and effects of such insolvent or deceased principal, as are reserved and secured to the *United States;* and shall and may bring and maintain a suit or suits upon the said bond or bonds in law or equity, in his, her, or their own name or names, for the recovery of all moneys paid thereon."

The *United States* had a right of action against *Paine*, as assignee of their bankrupt debtor, as soon as effects of the bankrupt had come to his hands. That action must have been against *Paine* personally. The same action is given to the surety, who shall have paid the bond. The right of action thus vested survived against the administrator of the assignee, who in that capacity is the debtor of the plaintiff to the amount paid by him for *Smith*. But as the effects which have come to the administrator's hands are not equal to that amount, the plaintiff must take what there is. This the law of the *United States* has given him; and he is not therefore obliged, as a common creditor, to come in for his dividend under the commission.

Bigelow, for the defendant, contended that the plaintiff's action was misconceived, and that it ought to have been in debt, and not in case. The 65th section of the statute, which has been cited, gives to the surety "a suit or suits *upon the bond*," by which an action of debt must be intended. The action of *Oliver* vs. *Smith* and *Paine* his trustee (1) was debt by a surety on a custom-house bond. The plaintiff failed, because the court held that Mr. *Paine*, being the assignee, could not be charged in that process as the trustee of *Smith;* but they say the action should have been brought against *Paine* directly as principal defendant; and they suggest no

(1) 5 *Mass. Rep.* 183.

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objection to the action as in *debt, although they [* 525] searched the record for objections not stirred by the counsel.

The plaintiff's right of action did not accrue until after all *Smith's* effects had, by the assignment of the commissioners, become vested in *Paine*, and no act of the plaintiff's, even though clothed with the preference given by the *United States'* law, could overreach that assignment. (2)

The action, however maintainable against the assignee, in his lifetime, does not survive against his administrator. The provision of the statute is in derogation of the principles of the common law, and ought to receive a strict construction. The administrator is not named in the statute. Nor can he in any sense represent the intestate, as he was assignee of the bankrupt, unless by taking administration he becomes himself assignee. Suppose debts and effects belonging to the bankrupt remain uncollected at the death of the assignee, can his administrator demand them? Again, suppose the bankrupt seised of real estate, which the assignee had not converted into cash before his death, would such real estate go to the administrator, or would he have any power to dispose of it? If not, he ought not to be liable for demands on his intestate in character of assignee. Many inconveniences would result from another construction. If this priority exists in respect to an administrator, it completely defeats the humane provisions of our laws, by which the expenses of the deceased's last sickness, and funeral charges, are in any event to be paid; and the consequence may be that even the dead body of one thus situated would remain without Christian burial.

An assignee of a bankrupt is himself *quasi* administrator; and on his death another assignee ought regularly to be created, on whom should devolve the rights as well as the duties attached to the office; as on the death of an administrator, (and by our statute of an executor,) an administrator *de bonis non* is always appointed, to whom the settlement of the estate belongs.

Jackson, in reply. The action is in effect *on the* [* 526] *bond*. The statute does not prescribe the form of the action. Every thing is averred in the declaration, which would be necessary to maintain the action, if it had been debt. But it is not easy to conceive the manner in which a declaration in debt on a bond could be framed, so as to suit the case of a joint obligor. The declaration in the case of *Champnies* vs. *Lisle & Al.* (3) was

(2) *Cooke's B. L.* 246. — *Sir W. Jones*, 202. (3) 1 *Binney's Rep.* 327.

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in *assumpsit* for a similar cause of action, and no objection to the form of the action was taken either by the court or at the bar.

The 62d section of the bankrupt law of the *United States* declares that " nothing contained in that law shall, in any manner affect the right of preference to prior satisfaction of debts due to the *United States*, as secured or provided by any law heretofore passed," &c. This is a sufficient answer to the objection arising from the assignment of *Smith's* effects being prior in point of time to the accruing of the plaintiff's right of action.

The claim of the *United States*, and consequently of the plaintiff, follows the property of *Smith*, into whatever hands it may have come. If the present defendant has it in possession, he is answerable. So would his administrator be also. The remedy against a second assignee, if one were appointed, would be cumulative. If nothing but real estate had remained in the hands of *Paine*, the defendant might well have pleaded no assets. As to the objection that physicians would be unpaid, and funerals cease to be celebrated if an administrator is held accountable, it may be answered, that money paid pursuant to law for such purposes would not be holden to be assets; for at the same time that in case of a conflict between the laws of the *United States* and those of an individual state, the latter must yield; yet the laws of the *United States* have not undertaken to determine what is or is not assets in the hands of an administrator for the payment of public claims upon him.

[* 527] * *By the Court.* Whether the defendant, in his capacity of administrator, would be answerable to a future assignee of the effects of the bankrupt, it is not now necessary to decide; but we are all of opinion that the present action does not survive, and cannot be maintained against the present defendant, as administrator of Mr. *Paine*, the assignee of *Smith* the bankrupt.

Verdict set aside.

CORNELIUS COOLIDGE AND ANOTHER *versus* WILLIAM GRAY.

A cargo was insured from *Boston* to the port of discharge in *Europe*, against all risks of every name and nature, (bad debts and illicit trade excepted;) it being understood by the parties that the vessel was intended for some port in *Holland*, or wherever else the master should deem proper, in case she could not get into *Holland:* The vessel arrived in the *Maese*, and might have gone to *Rotterdam*, but the master, learning that if he proceeded to *Rotterdam* the property would be confiscated, left *Holland* and proceeded to *Gottenburg*, and in going

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from thence for a market in the *Baltic* the vessel was captured by the *Danes*, and with the cargo condemned as prize. — It was held that neither the departure from *Holland*, nor the going from *Gottenburg* for a market, was a deviation; but that the property was still protected by the policy, and the underwriters bound to pay the loss.

ASSUMPSIT on a policy of insurance, dated April 10th, 1810, for 15,000 dollars on *Batavia* sugars, coffee, and spice on board the schooner *Cremer*, at and from *Boston* to her port of discharge in *Europe*, including blockaded ports, and there until safely landed, and in quiet possession of the consignee thirty days. It was also contained in the policy, that it was understood that all risks of every name and nature (bad debts and illicit trade excepted) were included in the policy; that the vessel, though cleared for *Tonningen*, was intended for some port in *Holland*, or wherever else the master should deem proper, in case he could not get into *Holland*; that by illicit trade in the policy was understood an infraction of the municipal laws; but the assured was to take the risk of *French* and *Dutch* decrees against *American* commerce; at a premium of twenty-five per cent., to return ten per cent. if from any cause the vessel should not discharge in *Holland*, or any blockaded port, and there should be no loss on the policy.

The declaration contained a second count for 15,000 dollars paid, laid out and expended by the plaintiffs to the use of the defend ant.

* The action was tried before *the Chief Justice*, who [* **528**] reported the following facts as appearing in evidence.

The schooner with her said cargo sailed from *Boston* on the 28th of March, 1810, and proceeded on her said voyage; and having escaped the *British* blockade of *Holland*, went so far up the *Maese* that she might have gone to *Rotterdam*, to which she was then proceeding, secure from capture by any *British* cruiser or any blockading force. But the master being there informed by his owners' correspondent in *Rotterdam*, that if he entered that port with his vessel, he would not be permitted to enter or land his cargo there, or in any port in *Holland*; and that his vessel and cargo would be seized and confiscated, if they were discovered by the *French* guards or custom-house officers; and there being imminent danger thereof, he immediately proceeded, with said schooner and cargo, for *Gottenburg*, to ascertain whether his cargo could be sold there to advantage, and if not, to what market in the north of *Europe* it would be best to carry it. He arrived at *Gottenburg* on the 13th of June, and remained there until the 21st of the same month; when he left *Gottenburg*, with the schooner and cargo, to proceed for a market in the *Baltic*. On the day follow-

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ing he was captured by a *Danish* privateer, and carried into *Copenhagen*, where he arrived on the 26th of said month, and where the vessel and cargo were libelled as prize, and after an acquittal at the Lower Court, were condemned on the appeal. Some money was expended by the plaintiffs in claiming the cargo at *Copenhagen*. The plaintiffs had property on board, in the articles mentioned in the policy, to the amount thereby insured. Those articles were the produce of a *Dutch* colony, and commanded a higher price in the *Boston* market, because such property was thought more secure from condemnation in *Holland* than similar articles not the produce of a *Dutch* colony.

The counsel for the defendant contended on the trial: — First, that by the true construction of the policy upon the [* 529] * facts proved in the case, the voyage insured terminated in *Holland*. Secondly, that if the master was authorized to leave the coast of *Holland*, yet by the true construction of the policy upon the facts proved, the voyage insured terminated in *Gottenburg*.

These points were overruled by *the Chief Justice*, and a verdict was taken for the plaintiffs for 16,405 dollars 60 cents. Whereupon the defendant's counsel moved for a new trial for the misdirection of the judge on the points aforesaid.

If the direction aforesaid was erroneous, the verdict was to be set aside, and a new trial granted; otherwise judgment to be rendered on the verdict for the plaintiffs.

Hall and *Dexter* for the defendant. By the *port of discharge* in the policy must be understood the port, at which the vessel may be able to discharge. The insurance was to some port in *Holland*, unless the vessel was unable to gain such port, being prevented by a blockading force. But not being so prevented, the risk terminated on the safe arrival of the property in the river *Maese*. The leaving that port exposed the property to another risk from the blockading squadron, and was a deviation not from necessity, but merely from apprehension of danger, which is no excuse for a deviation. (1)

But admitting the departure from *Holland* to have been from necessity, and that the policy covered the property to *Gottenburg*, the voyage must clearly be held to be at an end at this latter place. The policy contemplated but one port of discharge, that is any port where the cargo might be safely discharged, and this without any regard to the state of the market at such port, whether good or

(1) *Richardson vs. Maine Fire and Marine Insurance Company*, 6 *Mass Rep* 102.

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bad. (2) This expression, port of discharge, is novel, as applied to a port in a foreign country, although usual in relation to the return voyage to the *United States*, in which cases it has never been understood that the vessel has a right to range from port to port to find a convenient market for her cargo. A voyage insured must have some limits either * of time or place. [* 530] But if we are wrong in considering *Gottenburg* the end of this voyage under the policy in question, the voyage had no limits. The vessel might have gone to every port in *Europe*, and still have been protected by the policy. Such a construction is unreasonable in the extreme.

Prescott and *Jackson* for the plaintiffs. By port of discharge in the policy was intended the port where the vessel should begin to discharge. If the expression had been, as is not unfrequent, port or ports of discharge, we should contend that the cargo might have been partly discharged in one port and partly in another. If the intention of the parties to this policy had been to confine the voyage to one port, and oblige the master there to unlade, such port would have been named, instead of the general phrase, port of discharge, as the intention of the voyage is well known at the vessel's departure. By being able to get into *Holland*, must be understood an ability to get in for the purposes of the voyage, not merely that there should be no physical impossibility. The certainty of a total loss of the property, had the vessel proceeded to *Rotterdam*, was tantamount to the seizure by a blockading force. There was no opportunity, afforded while the vessel was in *Holland*, to learn the state of the markets, or to determine in what port to discharge. It was therefore within the fair and reasonable construction of the policy, that the vessel should have liberty to go to *Gottenburg*, or any other port, to obtain the necessary information, and that having obtained it, she should still be protected by the policy in proceeding to the port elected as the port of discharge. There was then no deviation, either in going to *Gottenburg*, or in proceeding from thence to a suitable market.

By the Court. Two objections are made on behalf of the defendant to the right of the plaintiffs to recover in this action. *First*, it is said that after the vessel had eluded the blockade, and had gotten safely into *Holland*, she had no right to leave *Holland* and go elsewhere at the risk of * the underwriter. [* 531] But our opinion is, that by *getting into Holland*, as used in this policy, must be understood getting in for some beneficial purpose, as the sale and delivery of the cargo, which was known to

(2) *Lee & Al.* vs. *Gray*, 7 *Mass. Rep.* 349.

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be the sole object of the voyage. The master had a right, and it was his duty, after receiving the information which he had from the correspondent of the plaintiffs at *Rotterdam*, to depart from the *Macse*, and seek some other port to discharge his cargo, as it would have been his duty to do, in case he had been boarded and warned to depart by a blockading squadron or ship, on his approaching the river. It would have been as wicked as imprudent for him under the circumstances, to have pursued his route to *Rotterdam*. This objection therefore cannot prevail. The *second* objection is, that even if the master had a right to leave *Holland* under the existing circumstances, yet that the policy having limited the voyage to one port only, the vessel must have discharged at *Gottenburg*, and that the voyage contemplated by the policy must cease there. The determination of this objection depends on the construction to be given to the words "port of discharge." As it appears that the policy was made some time after the vessel had sailed, it is presumable that no particular port of destination had been fixed upon previously to her sailing, and that it was left to the discretion of the master or supercargo to what port he should go. If he had broken bulk, or begun to unlade at *Gottenburg*, that must have been considered he port of discharge, and the voyage would have ended there within the policy. But we think, and in this opinion we are confirmed by that of several eminent underwriters of whom we have inquired, that when property is insured to a port of discharge, the assured has a right to obtain advice at his port of arrival respecting the markets, and having informed himself, has a right to proceed to such port as promises the best sales, and is still protected by the policy; not being obliged to discharge his cargo at the first port he makes.

Judgment on the verdict.

[*532]

*THE SCOTS CHARITABLE SOCIETY *versus* WILLIAM S. SHAW, Administrator.

A private statute incorporated certain members of a voluntary association for charitable purposes, and authorized the corporation to receive to their own use all moneys due to the association, and to give receipts for the moneys they should receive, which receipts might be given in evidence in any action that might afterwards be brought on any obligation made to the association: — It was held that the corporation could give effectual discharges to the debtors. But whether they could support actions against the debtors to the association, — or whether they would not be liable to the members of the association for the moneys received, — *Quære.*

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The declaration was in *assumpsit* upon a promissory note made by *James Gordon*, the defendant's intestate, dated November 29th, 1765, whereby the said *James* promised one *John Erving*, president of the *Scots Charitable Society*, then so called, one *William Murray*, treasurer of the same society, and one *John Moffat*, one of the managers thereof, to pay them or either of their orders, for the use of said society, the sum of 234*l.* 0*s.* 4 1-2*d.* of the late lawful money, &c. The plaintiffs then aver that the said *James Gordon* died intestate before the 16th day of March, 1786; and that by an act of the legislature of this commonwealth, passed on that day for incorporating *The Scots Charitable Society*, all the rights, credits and money then due and owing to the said *Scots Charitable Society*, of which the said *John Erving* was president as aforesaid, or to any person or persons for them or their use, were by the act aforesaid confirmed to the said Society by the said act incorporated, whereby the estate, which was of the said *James Gordon* deceased, became liable and chargeable to the said incorporated society for the contents of said note; yet the said administrator, though requested, &c.

A verdict was taken for the plaintiffs, subject to the opinion of the Court on the following facts agreed by the parties, *viz.* "That *John Erving*, Esq., survived the other promisees. *The Scots Charitable Society*, at the commencement of the revolutionary war, consisted of more than fifty persons, resident in *Boston*. At that time many of the members became absentees, and the society's case of papers was carried first to *New York*, and afterwards to *Nova Scotia*; and for some years the possessor refused to deliver it up to the members residing in *Boston*, alleging that the other members were entitled to their proportion of the funds; but at length, about six years since, he was induced to give it up, by being paid one hundred dollars.

* When the "act for incorporating certain persons [* **533**] by the name of the *Scots Charitable Society*" passed,
which was on the 16th of March, 1786, and which act is agreed to be a part of this case, the number of members in *Boston* was seventeen or eighteen.

If by force of the said act, the *Scots Charitable Society* have a right to maintain this action, upon the note declared on, the parties agree that judgment shall be entered according to the verdict, the costs to be subject to the opinion of the Court; but if the Court shall be of a different opinion, the parties agree that the amount of costs, to which the defendant might be entitled, shall be deducted from the amount of the verdict, and judgment be entered for the balance without costs.

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[The act referred to, (1) in its preamble recites that a number of persons had for many years associated themselves in the town of *Boston*, for the purpose of joining their charities, for the relief of certain widows, orphans, and other objects of charity, and had raised a common stock, but were unable to recover the moneys they had letten on interest, and to transact the business necessary for supporting the said institution. The first section incorporates certain persons by name, with such other persons as they may hereafter admit, by the name of *The Scots Charitable Society*, gives them power to have a common seal, and to make by-laws, &c. The 2d section enables them to sue and be sued, to make purchases, and to hold and manage estates, &c. The third section appoints the method of calling the first meeting, &c. The fourth section limits the number of the society. And the fifth section enacts that the society be "empowered *to receive to their use* all moneys due to the society heretofore called the *Scots Society* in *Boston*, before the passing of this act, and to give receipts for moneys they shall receive, to any person or persons who have heretofore given their obligations to the said *Scots Society*, which are now in the hands of absentees, which receipts may be given in evidence in any [* 534] *action that may hereafter be brought on any obligation of the description aforesaid."]

Dana for the plaintiffs.

Dexter, for the defendant, suggested that the power given the society to sue must relate only to suits thereafter arising on obligations made to the incorporated society. The authority, relative to debts due the voluntary association before existing, is only to receive payment when voluntarily offered by the debtors, and provides that such payment shall be a bar to other actions for such debts.

SEWALL, J., delivered the opinion of the Court.

The statute, and the particular section of it relied on for the plaintiffs, are so particular in designating the circumstances, which according to the facts stated are descriptive of the note declared on, and the state of the demand, as to be conclusive in their favor, as to their interest in the note, and their authority to discharge it upon payment, unless the legislature are incompetent to establish a right of this description by a private statute. And upon this point there would be some cause of doubt, if the statute changed, in any respect, the condition of the promiser in the note; or, as the case is, of his representatives. It seems to be admitted on the part of the administrator, that the note is due from the estate of his intestate, and payable to some person; and the only question, that seems

(1) *Special Laws*, vol. 1, 118.

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to be made on his behalf, is to whom; where shall the payment be made to avail, according to the fair intentions of the contract, and with safety to the parties liable for the demand?

These questions the legislature have attempted to answer, by designating the incorporated society, as the party to whom moneys heretofore due and payable to the voluntary society are to be paid, and to avail. For this purpose the incorporated society is clothed with an authority to receive to their use all moneys due to the voluntary society; and this act, made at the intercession of certain members of the voluntary society, will avail, so far at least as the agency in the collection is required, to transfer the right *originally vested in the voluntary society, or [* 535] rather in their nominal trustees; and under these circumstances the parties liable have a legal security in paying as the statute directs.

In this decision it is not necessary to construe the statute to be a transfer also of the beneficial interest and claims of the members of the voluntary society. As to them, the incorporated society may, after all, continue liable for all moneys received under this legislative provision.

Whether, however, a right of action is given by the statute for the moneys, which the legislature have authorized the incorporated society to receive, is another question, and one in which the rights of the supposed debtors are essentially involved. They may be thus exposed to two actions upon one and the same demand; and the question seems decided by the caution used by the legislature in this respect. The authority to receive, and to give an effectual discharge, does not necessarily imply an authority to demand or enforce the payment, by an action at law; and the expressions of the statute indicate a different intention.

Upon the whole, the judgment upon the agreement of the parties is to be entered, that the plaintiffs recover the sum found by the verdict, deducting the defendant's costs; and no costs are to be taxed for the plaintiffs. (*a*)

(*a*) [It seems plainly to have been the intent of the act to empower the corporation to demand, sue for, and receive, the moneys in question, to their own use. — ED.]

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JOHN BARNARD, Administrator of John Truman, *versus* SETH CURTIS.

Where, by reason of an account filed by way of set-off, the plaintiff's damages are reduced below twenty dollars, he is still entitled to full costs; — *aliter*, where the items in the account are proved to have been delivered and received in part payment of the plaintiff's demand in the action.

ASSUMPSIT on a promissory note made by *Curtis* to *Truman*, by whom the action was commenced, and upon whose death his administrator was admitted to prosecute it.

The defendant filed an account for sundry services performed, and for a puncheon of rum. On trial of the action on the general issue, all the charges in the account were
[* 536] * barred by the statute of limitations; but there was evidence to the jury that the rum had been delivered and received as part payment of the note; and deducting the value of it from the amount due by the note, they returned their verdict for sixteen dollars, the balance found due.

Smith, for the plaintiff, moved for costs.

Davis, [*Solicitor General*,] for the defendant, insisted that the plaintiff was entitled, by statute 1807, *c.* 122, to no more than one quarter part of the damage recovered, as his costs.

By the Court. This case must be distinguished from an account filed and allowed by way of set-off. In such case we have allowed full costs, though the balance found by the jury has been less than twenty dollars. But here was evidence of a partial payment, by which the plaintiff's actual demand is proved to be under twenty dollars. It is within the statute, and costs can be taxed but to the amount of one fourth part of the damage found by the verdict.

WILLIAM ROBINSON AND ANOTHER *versus* JOHN C. JONES.

A rescue by the crew of a neutral vessel, arrested and detained by a belligerent armed vessel for an alleged violation of neutrality, is a good cause of condemnation; and a loss happening from this cause is not within the perils usually insured against by a policy of insurance.

The sentences of foreign courts of admiralty are conclusive only when they distinctly and specifically state the causes of condemnation; therefore where a

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vessel and cargo were condemned for a rescue from the possession of a belli gerent captor, *or otherwise*, the assured were permitted to give evidence dis proving the alleged rescue.

ASSUMPSIT on a policy of insurance, dated September 26th, 1808, on the ship *Franklin* and her freight from *New London* to *Martinico*, and at and from thence to her port of discharge in the *United States;* 15,000 dollars on the vessel, and 1000 dollars on freight, against the usual risks.

Trial was had upon the general issue, November term, 1810, before *Parker*, J., from whose report of the evidence at the trial it appears, that the ship sailed from *New London* on the 11th of August, 1808, and arrived at *Martinico* on the 10th of September following. On the first of the ensuing November she was loaded and sailed for the *United States;* and on the 8th of the same month was captured by a *British* ship of war, and ordered for *Bermudas;* but *was afterwards taken [* 537] possession of by another *British* vessel, and carried to *Gibraltar*, where she was libelled and condemned as prize.

[In the decree of condemnation, after a recital that the hearing of further proof with respect to the rescue of the said vessel and her lading, and upon the reserved question of violating the blockade of the enemies' islands in the *West Indies*, the judge " pronounced the said vessel called the *Franklin* and her lading to have been unlawfully rescued and retaken by the master from the possession of the prizemaster, and others put on board thereof from his majesty's sloop of war *Ferret*, — *Wells*, Esq., commander, whilst proceeding to a *British* port for adjudication, and as such, or otherwise, subject and liable to confiscation ; and condemned the same as good and lawfu prize, &c."]

The defendant contended, that the said decree was conclusive evidence that the original capture was for violating a blockade of *Martinico*, and of her subsequent rescue by the master and crew which remained on board, and that for those causes she was justly condemned, and so the underwriters were discharged.

But the plaintiffs were permitted to show to the jury, notwithstanding said decree, that the island of *Martinico* was not blockaded, and that no rescue of the vessel took place; but that whatever was done was by the consent of the *British* prizemaster; and the jury were directed, that if they believed that the said island was not blockaded, and that no rescue had taken place, they ought to find a verdict for the plaintiffs, there having been an abandonment by the agent of the plaintiffs on the 23d of March, which was within a reasonable time after the intelligence of the original capture was received, and before the subsequent proceedings relative to said

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vessel were known to the plaintiffs, but in fact after the supposed rescue; and the jury were further instructed, that if they were satisfied that there was no blockade of *Martinico*, but that [* 538] the capture was a mere * pretext, without color of right, a rescue under such circumstances was no cause of condemnation by the law of nations, and a condemnation on such ground would not discharge the underwriters.

If the decree aforesaid was not conclusive evidence, and the above directions were right in the opinion of the Court, the verdict, which was found for the plaintiffs, was to stand, and judgment to be rendered thereon, with additional interest; otherwise the plaintiffs were to become nonsuit.

The action stood continued to the last March term, and was then argued by *Prescott* and *Sullivan* for the plaintiffs, and *Otis* and *Jackson* for the defendant; and being thence continued to this term for advisement,

PARSONS, C. J., pronounced his opinion to the following effect.

We all concur in the opinion, that there must be a new trial in this case on account of the misdirection of the judge who sat in the trial, with respect to the legal effects of a rescue. We cannot admit the doctrine, that the crew of a neutral vessel may determine for themselves, that an arrest made by a belligerent is without color of right, and in consequence of such determination may forcibly regain possession of the vessel.

The belligerent having a right, by the law of nations, to visit and search neutral vessels, to prevent them from entering or leaving a port of his enemy under lawful blockade; to seize and detain them if engaged in contraband trade, or knowingly violating a blockade; and to capture and carry into port neutral vessels, which may be transporting the property of his enemy, for the purpose of condemning such property; it would be utterly inconsistent with these rights of the belligerent to allow the neutral vessel to resist by force or to be retaken by her crew, whenever they might have opportunity to overpower the officers and men of the belligerent, in whose custody she may be placed. General principles of [* 539] policy and national law require that * in such cases the neutral should submit, and rely upon the justice of the tribunals of the belligerent nation to restore him to his rights, and give him indemnification, if the party arresting shall have abused his power, and without any pretext or probable cause, have subjected him to loss and damage. And if the tribunal should manifestly proceed upon unjust principles, the sovereign of the neutral country must interfere, and protect the rights and property of the citizens.

Nor would the interest of neutral nations be in any degree

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advanced by a change of the public law in this particular; for such a change would compel belligerents on every seizure of a neutral for a supposed breach of neutrality, either to take from the vessel all the original crew, to the great disadvantage of the voyage in case there should be a release of the vessel, or to use a degree of severity in the confinement of the crew, which has not hitherto been practised; which would be exceedingly injurious to them, as well as to the general commerce of the neutral, from the discouragement it would occasion to mariners.

Neutral powers should always be willing to allow to belligerents those rights and powers, which have been established and practised upon for ages; looking to the time when, according to the ordinary course of human events, they may be obliged to claim and exercise the same, for the vindication of their own rights when violated by other nations.

A rescue therefore of a neutral vessel, arrested and detained by a belligerent armed vessel for an alleged violation of neutrality, is a good cause of condemnation, and a loss happening from this cause is not within the perils insured against by the policy, upon which this action is brought. And although it seems probable that this was not the point upon which the verdict was found for the plaintiffs, yet as the judge directed the jury expressly, that such a rescue was no legal cause of condemnation, and as we cannot determine *how far that direction influenced [* 540] the minds of the jury, we are satisfied that there must be a new trial.

But as the principal inquiry has been upon another point, the determination of which will probably settle this cause, my brother *Parker* and myself think it proper to express our opinion upon it This point has been fully argued, and sufficiently deliberated upon by the Court; and is, whether the decree of the Vice Admiralty Court in *Gibraltar* condemning this vessel and cargo, is in its nature conclusive evidence, so that the plaintiffs ought not to have been permitted at the trial to contradict it by the evidence, which was on their part submitted to the jury.

The operative words of the decree are, "that the said vessel called the *Franklin* and her lading" are pronounced "to have been unlawfully rescued and retaken by the master from the possession of the prizemaster and others, put on board thereof from his majesty's sloop of war *Ferret*, —— *Wells*, Esq. commander, whilst proceeding to a *British* port for adjudication, and as such or otherwise subject and liable to confiscation, and condemned the same as good and lawful prize," &c. — It was contended at the trial that this decree was conclusive evidence of the fact of a rescue, and

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that the condemnation proceeded upon that fact; and that the testimony exhibited by the plaintiffs to prove that such rescue did not take place, ought to have been rejected by the judge.

It is not intended to call in question the decision which took place so recently in the case of *Baxter* vs. *The New England Marine Insurance Company.* (1) The question as to the conclusiveness of decrees of Admiralty Courts, which until then was open in this commonwealth, must be considered as settled by that decision. The numerous decisions, which had taken place in *England* before the *American* revolution, and the general adoption of the *English* law in this commonwealth, render it probable that our [* 541] mercantile * contracts have been generally entered into with a view to that law and those decisions. There was therefore a propriety in being governed by the cases cited in support of the conclusiveness of decrees, however questionable may have been the principle or policy of those decisions when first adopted and made part of the law merchant. If, therefore, no substantial difference exists between the decree considered by the Court in the case referred to, and that which is produced in the case now before us, the same judgment must follow; the decree is conclusive, and the evidence admitted by the judge ought to have been rejected.

But we think that there is a manifest difference between the two decrees, and that, in conformity to all the cases in which evidence of this nature has been held to be conclusive, the decree now before us ought not to be so held, and that it may be controlled by other legal and sufficient evidence.

The decree in *Baxter* vs. *The New England Marine Insurance Company*, after having expressly and distinctly alleged that the vessel had violated a blockade *de facto* by egress, proceeds to allege that for that *and other sufficient causes*, she was condemned. Here was not only a direct assertion that a blockade had been violated, but also that the violation was a cause of the condemnation; and this being a sufficient cause by the law of nations, it was immaterial whether any other causes existed or not.

But the present decree, after alleging a rescue, declares that for such cause, *or otherwise*, the vessel is liable to condemnation. Now, we know no rule of construction, by which it can be maintained that these words amount to a direct allegation that the rescue was even one of the final causes of the condemnation. There had been, as appears from the decree, an inquiry relative to the violation of the blockade of the *West India* islands; with respect to which perhaps the judge was not fully satisfied: — Admit that he was

(1) 6 *Mass. Rep.* 277.

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fully satisfied that a rescue had actually taken place; yet * he might not hold himself obliged, under all circum- [* 542] stances, to condemn expressly for that cause. The natural construction of his phraseology is, that as the vessel had been rescued, she was liable to condemnation for that cause, *or* for some other cause not stated. Now this is far from being a direct unequivocal assertion that she is condemned because she has been rescued.

We understand the principle to be, that where it does not appear by the decree itself on what particular ground the condemnation was had, the case is to be open to evidence, as to all the points which it may be necessary for parties in interest here to establish, except the fact of condemnation. The decree in such case cannot be more than *primâ facie* evidence; and as the underwriters upon a policy of insurance, according to the opinion of one of the judges in the case of *Lothian & Al.* vs. *Henderson & Al.*, (2) cannot be received in the Admiralty Court as a party, nor heard upon the trial; so ought not the assured to be shut out from proving the truth of his case, and showing that he is entitled according to the fair principles of his contract to be indemnified.

The form of expression used in this decree is but of recent origin, and upon inquiry we are led to suppose that it has been adopted for the very purpose of avoiding the inconvenience obviously arising to distant and innocent parties, from their being bound by decisions in admiralty courts, where they have had no opportunity of asserting their rights.

Even in *England*, where the doctrine of the conclusiveness of sentences of condemnation has been long established, and from whence it has been transported into this country, it seems to be adhered to rather from respect to precedent than from attachment to the principle; for great inconveniences are acknowledged to have flown from it.

The case of *Fisher* vs. *Ogle* (3) proves how willing Lord *Ellenborough* and the other judges were to escape from a doctrine, which they found to bear hard upon the * parties [* 543] to an insurance contract. A vessel represented *American* was insured, and upon her voyage was captured by a *French* privateer. The sentence of the *French* court stated that it resulted from the papers on board, &c. &c., that the expedition, the cargo, and the operations of the captain were for the account of the *Brothers Geddes*, merchants of *London*, who had, to mask the *English* property of the outfit, borrowed the *American* flag, &c.,

(2) 3 *Bos. & Pul.* 499. (3) 1 *Campbell's Nisi Prius*, 419.

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and then condemned the ship as good and valid prize, and confisca ted the ship and cargo. Now, it is apparent that the Court proceeded upon the ground that the ship and cargo were *English* and not *American;* and yet because this was not explicitly declared in the sentence, Lord *Ellenborough* let the assured in to prove that his representation was true; and on motion for a new trial the other judges concurred with him, and a rule was denied. His lordship said he must look to the adjudicative part of the sentence, and would not fish for a meaning. He said too, "It is by overstrained comity that these sentences are received as conclusive evidence of a fact, which they *positively* aver, and upon what they specifically profess to be founded."

Now, if we look to the adjudicative part of the sentence in this case, we find the ship was condemned as good and lawful prize; if we look for reasons, we shall find that she was so condemned, because she had been rescued, *or otherwise;* that is, for the reason specifically set forth, *or* for some other reason which is not stated.

Upon the whole I think that we go full far enough, in holding sentences to be conclusive, when they distinctly and specifically state the causes of condemnation; but that parties in this country, to contracts made here, ought not to be bound by a trial in a foreign forum, in any cases, but those which come strictly within the judicial decisions upon the subject. I am therefore of opinion that the evidence to contradict the allegations in the decree produced in the trial of this action was rightly admitted.

PARKER, J., concurred.

[* 544] * SEWALL, J. The general question in this case is, whether the loss proved, happened by a peril insured against? Or, in other words, is the total loss, averred and proved in this case, to be attributed to causes which excuse the underwriter?

The insurance is for the round voyage, or to and from the *West Indies.* After the commencement of the return voyage, when bound from *Martinico* to the *United States*, the vessel, laden with a homeward cargo, was captured by a *British* ship of war, and ordered for *Bermudas.* Before she arrived there, the *American* master and the part of the crew remaining on board, regained the possession of the vessel by some means or other, and were proceeding on their return voyage, when they were again captured by another *British* armed vessel, carried to *Gibraltar*, and there the vessel and cargo were finally condemned and sold for the use of the captors. By these events a total loss has happened; but to this demand therefore the underwriter objects, that the capture and condemnation were the consequences of a breach of neutrality; and that the vessel and

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cargo had been regained from the first captors by a *rescue*, which produced the sentence of condemnation upon the second capture.

In the argument the counsel for the plaintiffs have endeavored to maintain, that the loss demanded upon their policy is to be attributed exclusively to the first capture; because they gave notice to the insurers, and offered them an abandonment of all the property insured, upon intelligence of it, before the subsequent events were known; and this offer is insisted on, as a transfer to the insurers from the time of the first capture, being, it is said, an abandonment upon intelligence true in fact, of a property which has never been restored, or effectually relieved from the disaster, which gave occasion to the abandonment, and justified it.

The first capture, separately considered, as it must be for the principal purpose of this argument, was not necessarily *a total loss; it might have proved only a very short [* 545] detention, and ceased before the abandonment was made.

The direct consequences of the first capture, in this view of it, are wholly unknown; and at any rate the consequences have been aggravated by the subsequent conduct of the master. The vessel was ordered for adjudication to *Bermudas*. If there had been no breach of blockade, the legal presumption must be, I think, that a speedy discharge or acquittal would have ensued upon her arrival there; and the first capture might have proved an interruption only, and not a total and inevitable loss of the property or voyage insured. To justify the abandonment, therefore, the events subsequent to the first capture are necessarily connected with it; and then it is immaterial whether the loss be attributed to the first or the second capture, or to both events as the proximate or immediate causes. The loss is a capture and condemnation as prize; and the question still is, — To what cause is the condemnation, which constitutes the total and final loss of the vessel and cargo, to be attributed? The insurers say, to a rescue, or if you please, an attempt to rescue, after the first capture; which was a forfeiture of the neutrality of the vessel and cargo.

As the Court concur in an opinion, that a vessel insured as neutral is to be conducted with a suitable regard to her neutral character, so far as that depends upon the master and other agents entrusted by the assured; and that a loss incurred, and which becomes total, in consequence of a voluntary forfeiture of neutral character, is not a loss by any peril insured against by the policy in question; and that a rescue, or an attempt to rescue, or a resistance to search, where a neutral vessel is in the possession or power of a belligerent armed vessel, is a forfeiture of neutrality, I shall not make any observations on these points.

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But the point, upon which I have the misfortune to differ in opinion from *the Chief Justice* and my brother *Parker*, is as to the effect of the proof relied upon for the defendant in this case.

[* 546] * The capture, as stated, is proved by oral testimony, and the condemnation by an authentic copy of the proceedings in the prize court at *Gibraltar*. Whether this document is produced by the plaintiffs, or by the defendant, it forms a necessary part of the evidence of the loss demanded, and is indispensably and necessarily admitted in the inquiry. If there is evidence that the vessel was captured and detained, there is also evidence of her condemnation as lawful prize to the captors. And if from the same documents there is conclusive evidence of a breach of neutrality, by which the condemnation was justified upon the rules and principles of the public law, common to all civilized nations, then the insurers are excused.

According to the decree of the prize court given in evidence in this case, the judge pronounced the vessel called the *Franklin*, and her lading, to have been unlawfully rescued and retaken from his majesty's sloop of war *Ferret*, &c., whilst proceeding to a *British* port for adjudication; and as such, *or otherwise*, subject and liable to confiscation, and condemned the same as good and lawful prize, &c.

Now this decree or sentence of a foreign court of admiralty, as to that which is clearly expressed in it, is conclusive evidence against the plaintiffs, and is not to be controverted by them in a suit upon a policy of insurance. This proposition is established by the decision of this Court in the case of *Baxter* vs. *The New England Marine Insurance Company*; and I shall not go again into an examination of the reasonableness or authority of that decision. There is no question, whether we are bound to adhere to it; and for my part, I am entirely convinced that it was consonant to a long course of decisions upon the same subject, which are received as authorities with us; and as a rule of evidence, that it is not to be departed from without manifest inconveniences of very serious import. But however this may be, it must be now

[* 547] considered * as the rule, and an implied condition of the contract of insurance, that upon a capture by a belligerent, if a condemnation ensues, explicitly made upon an alleged forfeiture of neutrality, the underwriters are excused. And I cannot bring my mind to doubt, although strongly induced to it by the respect justly due to the contrary opinion from mine, that in this case the decree of the prize court contains, and there is clearly expressed in it, a condemnation for an unlawful rescue; that this is definitively pronounced to be the cause of condemna-

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tion; and that the phrase "*or otherwise*" has no effect to exclude, or to render doubtful, what is stated and declared; but only to include in the sentence any other causes, if any others should be found; intimating the possibility of them, without affirming that there are any. This is a matter to be decided rather by perception than argument; and I shall not attempt any.

As to the necessity for a new trial, upon the direction given respecting the effect of the testimony, admitted to control the admiralty decree, I fully concur in granting it.

SEDGWICK and THATCHER, justices, were not present at the argument or decision of the cause.

New trial granted.

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SUPPLEMENT.

A LETTER FROM THE GOVERNOR OF THE COMMONWEALTH OF MASSACHUSETTS, TO THE JUSTICES OF THE SUPREME JUDICIAL COURT, WITH THE ANSWER OF THE JUSTICES.

The Honorable the Justices of the Supreme Judicial Court of the Commonwealth of Massachusetts.

GENTLEMEN, BOSTON, *August* 1, 1812.

HAVING laid before the council of this state a letter from the secretary of war of the 12th of June last, and letters dated June 22d, and July 15th, which I received from Major Gen. *Dearborn*, and also a letter which I have received from the secretary of war of July 21, 1812, requesting their advice what measures ought to be adopted in consequence of the requisition expressed in the said letters: — The council thereupon advised that, as upon important questions of law, and upon solemn occasions, the governor and council have authority by the constitution to require the opinions of the justices of the Supreme Judicial Court, it is advisable to request the opinion of the justices of that court on the following questions, *to wit*: —

1. Whether the commanders in chief of the militia of the several states have a right to determine whether any of the exigencies contemplated by the constitution of the *United States* exist, so as to require them to place the militia, or any part of it, in the service of the *United States*, at the request of the president, to be commanded by him, pursuant to acts of congress.

2. Whether, when either of the exigencies exist authorizing the employing of the militia in the service of the *United States*, the militia thus employed can be lawfully commanded by any officers but of the militia, except by the president of the *United States*.

In conformity with the foregoing advice of the council, I request you, gentlemen, to state to me your opinions on the questions

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above mentioned, as soon as conveniently may be. The secretary will deliver you herewith the letters above mentioned.

I am, gentlemen, with great respect,
Your most obedient servant,
CALEB STRONG

To his Excellency the Governor, and the Honorable Council of the Commonwealth of Massachusetts.

THE undersigned, justices of the Supreme Judicial Court, have considered the several questions proposed by your Excellency and Honors for their opinion.

[* 549] * By the constitution of this state, the authority of commanding the militia of the commonwealth is vested exclusively in the governor, who has all the powers incident to the office of commander in chief, and is to exercise them personally, or by subordinate officers under his command, agreeably to the rules and regulations of the constitution and the laws of the land.

While the governor of the commonwealth remained in the exercise of these powers, the federal constitution was ratified, by which was vested in the congress a power to provide for calling forth the militia *to execute the laws of the Union, suppress insurrection, and repel invasions;* and to provide for governing such part of them as may be employed in the service of the *United States*, reserving to the states respectively the appointment of the officers. The federal constitution further provides that the president shall be commander in chief of the army of the *United States*, and of the militia of the several states when called into the actual service of the *United States*.

On the construction of the federal and state constitutions must depend the answers to the several questions proposed. As the militia of the several states may be employed in the service of the *United States* for the three specific purposes of executing the laws of the Union, of suppressing insurrections, and repelling invasions, the opinion of the judges is requested, whether the commanders in chief of the militia of the several states have a right to determine whether any of the exigencies aforesaid exist, so as to require them to place the militia, or any part of it, in the service of the *United States*, at the request of the president, to be commanded by him pursuant to acts of congress.

It is the opinion of the undersigned, that this right is vested in the commanders in chief of the militia of the several states.

The federal constitution provides, that when either of these

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exigencies exist, the militia may be employed, pursuant to some act of congress, in the service of the *United States*; but no power is given, either to the president, or to the congress, to determine that either of the said exigencies does in fact exist. As this power is not delegated to the *United States* by the federal constitution, nor prohibited by it to the states, it is reserved to the states respectively; and from the nature of the power, it must be exercised by those, with whom the states have respectively entrusted the chief command of the militia.

It is the duty of these commanders to execute this important trust agreeably to the laws of their several states respectively, without reference to the laws or officers of the *United States*, in all cases, except those specially provided for in the federal constitution. They must, therefore, determine when either of the special cases exist, obliging them to relinquish the execution of this trust, and to render themselves and the militia subject to the command of the president.

[* 550] * A different construction, giving to congress the right to determine when those special cases exist, authorizing them to call forth the whole of the militia, and taking them from the commanders in chief of the several states, and subjecting them to the command of the president, would place all the militia in effect at the will of congress, and produce a military consolidation of the states, without any constitutional remedy, against the intentions of the people, when ratifying the federal constitution. Indeed, since the passing of the act of congress of February 28th, 1795, vesting in the president the power of calling forth the militia, when the exigencies mentioned in the constitution shall exist; if the president has the power of determining when those exigencies exist, the militia of the several states is in fact at his command, and subject to his control.

No inconveniences can reasonably be presumed to result from the construction, which vests in the commanders in chief of the militia in the several states the right of determining when the exigencies exist, obliging them to place the militia in the service of the *United States*. These exigencies are of such a nature, that the existence of them can be easily ascertained by, or made known to the commanders in chief of the militia; and when ascertained, the public interest will induce a prompt obedience to the acts of congress.

Another question proposed to the consideration of the justices, is, whether, when either of the exigencies exist, authorizing the employing of the militia in the service of the *United States*, the militia thus employed can be lawfully commanded by any officer but of the militia, except by the president of the *United States*.

The federal constitution declares, that the president shall be the

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commander in chief of the army of the *United States*. He may undoubtedly exercise this command by officers of the army of the *United States*, by him commissioned according to law. The president is also declared to be the commander in chief of the militia of the several states, when called into the actual service of the *United States*. The officers of the militia are to be appointed by the states; and the president may exercise his command of the militia by the officers of the militia duly appointed. But we know of no constitutional provision, authorizing any officer of the army of the *United States* to command the militia, or authorizing any officer of the militia to command the army of the *United States*. The congress may provide laws for the government of the militia, when in actual service; but to extend this power to the placing of them under the command of an officer, not of the militia, except the president, would render nugatory the provision, that the militia are to have officers appointed by the states.

* The union of the militia in the actual service of the [* 551] *United States*, with the troops of the *United States*, so as to form one army, seems to be a case not provided for or contemplated in the constitution. It is therefore not within our department to determine on whom the command would devolve on such an emergency, in the absence of the president. Whether one officer, either of the militia, or of the army of the *United States*, to be settled according to military rank, should command the whole; whether the corps must be commanded by their respective officers, acting in concert as allied forces; or what other expedient should be adopted, are questions to be answered by others.

The undersigned regret, that the distance of the other justices of the Supreme Judicial Court renders it impracticable to obtain their opinions seasonably upon the questions submitted.

(SIGNED) THEOP. PARSONS.
SAMUEL SEWALL.
ISAAC PARKER

OF MORTGAGES.

[BY THE LATE JUDGE TROWBRIDGE.]

TENANT in fee simple is he who hath lands and tenements, to hold to him and his heirs forever. *Fee* signifieth inheritance, and *simple* is added, because it is descendible to heirs generally. *Co. Lit.* 1. *b.*

None can have a larger estate of inheritance than a fee simple.

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This extends to fee simple conditional, as well as fee simple absolute; for he that hath a fee simple conditional hath as ample and great an estate, as he who hath a fee simple absolute; although it may not be so durable. *Co. Lit.* 18. *a.*

Among conditional estates are mortgages of lands and tenements. These are sometimes of the freehold and inheritance, and sometimes for a term of years only.

1. Of the freehold and inheritance; where a feoffment is made upon condition, that if the feoffor pay the feoffee 40*l.* at a certain day, then he shall reenter, &c. Here the land and all the feoffor's estate in it pass presently to the feoffee by common law; and the feoffor has only the condition left, and no estate in the land that he can assign over. (*Co. Lit.* 205, *a.* 210, *a.*) So if one here, by deed duly acknowledged and registered, conveys his land to another and his heirs upon the like condition, the land and all the mortgagor's estate in it pass presently to the mortgagee by force of the provincial act of 9 *Will.* 3, *c.* 7. (1 *P. Will.* 74.) But here the mortgagor has not only the condition left, by the force and effect of the deed; but by 10 *Will.* 3, *c.* 13, and 12 *Ann. c.* 1 has also a right to redeem the land by paying the money [* **552**] and * interest at any time within three years after entry for the condition broken. This right to redeem the land is by the act of 8 & 9 *Geo.* 2, *c.* 5, declared to be liable to be attached and taken in execution for the mortgagor's debts, although at common law it is considered as a chose in action, and not assignable. Yet the Court of chancery allows it to be assigned; and if not, considers it as descending to the heir, and coming to him who would have a right to the land if it had not been mortgaged. (*Hard.* 465.—3 *Bac. Abr.* 638, 646.)—But it is not liable to be taken in execution. Although at common law the estate passes presently from the mortgagor to the mortgagee, yet the Court of chancery considers the mortgagor before forfeiture as having the legal estate in him; and after forfeiture, having the right of redemption, he is considered as the owner and proprietor of the estate, so far as that he may by lease or otherwise settle and dispose of the estate so as to bind the equity of redemption. 3 *Bac. Abr.* 635.

Second and third deeds of mortgage in fee of the same lands are good between the parties, although nothing passes but the right of redemption; but after failure of performing the condition, the Court of chancery also considers the legal estate to be in the mortgagee, although the mortgagor continues in possession. Where a copyhold, &c., is mortgaged, and the mortgagee admitted, the mortgagor, not having the legal estate, cannot surrender, and therefore may devise without surrender. (3 *P. Will.* 360.) But nothing passes but his right of redemption. One seised of lands in fee,

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which were only mortgaged to him, devises them to his son and heir, they shall descend as an inheritance, and if the mortgage be paid off, the heir shall have the money, and not the executor. 3 *Bac. Abr.* 642. — *Abr. Eq.* 320. — 2 *Vern.* 581.

In the case of *Collet* vs. *De Golls & Ward* in *Chanc.* 1734, it appeared that one *Tyssen*, being seised of considerable real estate, part whereof was mortgaged to *Bradley*, conveyed to *Ward*. But it was held by Lord chancellor *Talbot*, that *Bradley* the mortgagee had the estate in him, and that *Tyssen* the mortgagor had no estate in him, to convey to *Ward*. (*Cases Temp. Talbot*, 66.) Sir *Joseph Jekyl*, master of the rolls, made a similar decree in the case of *Hasket* vs. *Strong*, (*Str.* 689,) which was thus: *How* mortgaged to *Neal* for 500 years; then to *Hasket* in fee; then *Neal* assigns his term to *Strong*, who, advancing more money to *How*, took a deed of inheritance. It was contended, that the term was merged, and on the question whether it were merged or not, his honor decreed that it was not; because after *How* had mortgaged to *Hasket* in fee, he had no estate in him to grant, and therefore the grant to *Strong* being void, the term could not be merged in a void grant.

* It is on this principle, that the estate in the mort- [* **553**]
gaged premises vests and remains in the mortgagee until it is reconveyed by him, that a third mortgagee without notice, by buying in the first mortgage, secures himself against the second; for being in equity equally entitled to a repayment of the money lent as the second mortgagee, and having the legal estate also, a Court of equity will not take that from him in favor of one who has no more equity on his side than he. So a mortgagee, after having received the money due to him, is considered as a trustee of the estate for the mortgagor until he reconveys. 3 *P. Will.* 252. — 1 *Vern.* 41.

Upon the mortgagee's dying intestate, the estate descends to his heir, and he holds it in trust for the executor, &c.; and upon the mortgagor, his heirs, &c., paying the executor all the money due upon the mortgage, the Court of chancery will oblige the heir of the mortgagee to reconvey the land. The land is a deposit for the money; the heir of the mortgagee is a surety to keep the pledge; it is proper he should keep it, as it is real estate, until the whole money is paid. (3 *Bac. Abr.* 641. — *Abr. Eq. Ca.* 327.) So it is the course of B. R. and C. B. since the late statute, on the mortgagor's paying principal and interest, to oblige the mortgagee to reconvey the land. (*Strange*, 1107.) The provincial act (10 *Will.* 3, *c.* 14) also goes upon the supposition, that the mortgagee, his heirs or assigns, after default of payment at the day, and entry for the condition broken, have not only the land, but the estate in it; and therefore provides that, upon the payment of the principal and

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interest, the mortgagee, his heirs or tenant in possession, being a purchaser, and holding in his own right, shall restore possession to the mortgagor, and release their right therein to him.

It is objected to this doctrine, that Lord *Mansfield*, in considering what species of property a mortgagee has in the estate mortgaged, lately said (2 *Burr.* 978, 979) that a mortgage "is a charge upon the land; and whatever would give the money, will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it, as a consequence; nay, it would do it, though the debt were forgiven only by parole; for the right to the land would follow, notwithstanding the statute of frauds." 3 *Cha. Rep.* 3.

Upon this authority it is said that the mortgagee has no legal estate in the land; that all mortgages are personal estate; and if the land is not redeemed, nor redeemable, the judge of [* 554] probate * has a right to assign to the widow, where there are children, a third, and where there are none, half the land, to hold, not during life, but forever in fee

In the case, in which the propositions are laid down by Lord *Mansfield*, from whence the inferences are drawn, it is observable, that there were but two points in question, or determined by the Court. 1st, Whether the testator by his will created an estate tail to his son and daughter in a close, which was mortgaged in fee to the testator, having run for eight or nine years only? — 2d, If they had such an estate tail in the close, whether it was barred by the surrender. It is also to be remembered that the reporter, in his preface, (page 9,) says, "I do not take notes in short hand. I do not always take down the *restrictions*, with which the speaker may qualify a proposition, to guard against its being universally understood, and in too large a sense. And therefore I caution the reader always to *imply* the exceptions which ought to be made, when I report such propositions as falling from the judges."

These are "propositions," which the reporter says fell from Lord *Mansfield*; but whether they are in his own words, or the reporter's, or whether with or without restrictions, is not certain; but the reader is to imply restrictions, if they ought to be made.

In order the better to settle the authority of these propositions, said to have fallen from Lord *Mansfield*, it may not be amiss, first, to consider the third proposition, *viz.*, that the estate in the land "is the same thing as the money due upon it;" as it may serve to illustrate the rest, and show what is intended to be implied in some or all of them.

If the mortgagee's estate in the land is the same thing, as the

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money due upon it, then the money due upon the land is the mortgagee's estate in it; and consequently there is no difference between the mortgage of land for a term only, and a mortgage of it in fee, if it be for the same sum; the money, which is the estate in the land, being exactly the same in both cases; and the mortgagee in fee has no other nor greater estate in the land than the mortgagee of a term only hath. This proposition, if true, when taken according to the words of it, without restriction or limitation, at once destroys the distinction between the *vadium vivum* and the *vadium mortuum*. It renders idle the invention and substitution of mortgages for a term instead of mortgages in fee, and tends to prove that the mortgagee has no estate, according to the legal sense of words, in the land. But surely Lord *Mansfield* did not so understand the proposition; for in that which immediately precedes it, he plainly distinguishes between the money and the estate in the land, and so he doth in those which follow. In the same case he just before says, that if it appeared that the testator really meant and intended to devise the * close as land, [* **555**] it would be a devise of the land, the mortgage being forfeited by law, and the estate in the land having become absolute. What, was the money become absolute? No, surely. His lordship meant, that the conditional fee simple, which the mortgagee had in the close by the non-payment of the money by the day, had become an absolute fee simple in law; so that he might devise the land to his son and daughter in fee tail; and if that was his intent in the will, the close would pass accordingly, as an estate of inheritance in fee tail so long as it continued, which would be until it was redeemed, or the estate tail was spent, agreeably to what lord keeper *Wright* said in *Gilb. Eq. Ca.* 3, in the case of a mortgage in fee.

The money due on the mortgage could not by Lord *Mansfield* be considered as the estate in the land, so as to make the money real estate, nor the estate in the land money; so as to make an estate in fee in land or the land itself personal estate. His lordship doubtless well knew there was a difference between a mortgage of land for a term only and a mortgage in fee; that the former was but a chattel, and the latter an estate of inheritance; that the former, unless dependent upon the inheritance, was *legal* assets, and the latter *equitable* assets only; that the former went directly to the executor, &c., but the latter descended to the heir, and the executor could not have the land without the aid of the Court of chancery. And yet the several propositions, as they stand, confound mortgages for a term and mortgages in fee together; as though there was no difference between them, which it is not reasonable to suppose Lord *Mansfield* ever did; and therefore it must be supposed the reporter did not take down the restrictions, with

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which his lordship qualified his propositions, and left them to be implied by the reader.

All mortgages are charges and liens upon the land. A mortgage is a lien on the real estate, both in the hands of the testator, devisee, and whomsoever it may come to. (*Cases Temp. Talb.* 54.) But the estate in the land is not the same thing as the money due upon it. And his lordship, by this proposition, if he laid it down in those words, could intend and mean no more than that the mortgagee's estate in the land was worth no more than the money due upon it. His lordship must know, that if it was a mortgage of a term only, and not dependent upon the inheritance, it was at law liable to debts, would go to executors, and pass by a will not executed with the solemnities required by the statute of frauds: But if it was even a mortgage of a term dependent upon the inheritance, it would not pass by such a will, as had been decreed by sir *Joseph Jekyl*, master of the rolls, and his decree affirmed on the appeal by Lords *Gilbert* and *Raymond*. (*Gilb. Eq. Ca.* 3.) Lord *Mansfield* must know that the assignment of the debt due upon a mortgage in fee, or forgiving the debt by parole, will not [* **556**] draw the land with it, as a * consequence or otherwise, without the aid of the Court of chancery; and that aid is to be implied by the reader, without which the proposition is not true. For if the mortgagor in fee shall, after the day of payment is elapsed, pay the mortgage money to the mortgagee, it doth not revest the fee in him in law, nor even in equity; because the mortgagee is deemed in such case by the Court of chancery a trustee of the mortgagor, &c.. until the estate is reconveyed; and so is a vendor after a contract to convey, and the land, though not conveyed, will in equity pass by the will of the vendee as his land. (3 *Chan. Rep.* 3.) And surely forgiving the debt will not vest the estate in the mortgagor, more than payment of the mortgage money. Nay, where mortgages are devised to executors, upon payment of the money to them, the heir is decreed to join in the reconveyance.

If what is said to have been laid down by Lord *Mansfield* is to be taken without limitation or restriction, and held for law, to what end are all the applications to the Court of chancery, to compel the mortgagee or his heir to reconvey to the mortgagor, or to the executor of the mortgagee? They are all vain and idle, if mortgages in fee go to the executors and administrators as mortgages of terms not dependent on the inheritance. These being chattels are to be inventoried, as well as lands extended, which are to be held as terms. (2 *Burns, Ecc. Law*, 652.) They are within the jurisdiction of the ordinary; but mortgages in fee are not, unless the money be paid. He has nothing to do with the land, nor have the

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executors or administrators, without the aid of chancery; for if the mortgagor does not pay the money, the heir may foreclose him, and then the Court of chancery will not compel the heir to convey the land to the executors, if he will pay the money due upon it. (2 *Vern.* 670.) So far indeed the money may be said to draw the land after it; the Court of chancery makes the money due on a mortgage in fee assets for the payment of debts, and orders the land to be sold to raise the money, or to be conveyed to the executors for that purpose, if the heir of the mortgagee will not save the land by paying the money, as he may. Hence such assets are called equitable assets, being made assets in a Court of equity, and not by law; and they are to be administered in a different way from legal assets. The latter are to be applied in the common course of administration; but the former are to be paid proportionally among all the creditors, &c. 2 *Vern.* 61, 764. — 2 *Cha Rep.* 116.

The difference between legal and equitable assets is here the same as in *England*, save only that the superior Court of judicature, &c., although not as a Court of equity, are empowered by law to enable the executor to sell part, and if necessary the whole of the deceased's real estate for the payment of his debts and legacies. The legal assets are the same as in *England*. The Court
* of Probate has the same power over them here, as the [* 557]
ordinary has over them there, and no more; and executors and administrators have the same power and rights over them in both countries. But neither the Court of Probate, nor executors or administrators can apply the real estate of the testator or intestate to the payment of debts, &c., without the aid of the Superior Court, any more than the ordinary and executors, &c., in *England*, without the aid of the Court of chancery.

If the mortgagor in fee pay the money at the day, on his entry he is in his former estate. If he does not pay, &c., yet by law he is empowered to redeem at any time within three years after entry for the condition broken, by paying principal and interest, &c., or tender of it; but yet by mere entry and payment, the mortgagor is not in as of his former estate, nor can he regain it, but by a reconveyance, or a judgment of the inferior or superior Court, as judges in equity under the prov. law, (10 *Will.* 3, *c.* 13,) any more than in *England* without a reconveyance or the aid of chancery. If the mortgagor will not voluntarily redeem the land, and there is no bond or covenant for payment of the money, he cannot here be compelled to do it, but the land must remain the mortgagee's real estate, and be distributed accordingly; at least after the three years are elapsed.

Hence the inferences drawn from Lord *Mansfield's* reported propositions are without foundation; for as lands mortgaged for a term

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only, are chattels, and mortgages in fee being designed only for securities for the payment of money lent, and being subject to redemption after forfeiture by payment of the principal sum and the interest, &c.; and all mortgages are considered as personal estate in general; and as in natural justice and equity the principal right of the mortgagee is to the mortgage money, and his right to the land is only as a collateral security, for the payment of the money, mortgages are in *courts of equity* looked upon as personal estate, unless the mortgagee in his lifetime or by his last will do otherwise declare and dispose of the same. (*Treat. on Equity*, 91.) Yet when the mortgagee doth otherwise declare or dispose of the same, they are not looked upon by the courts of law or equity as personal estate, but as real; and then the land passes as an inheritance descendible to the heir. (2 *Vern.* 582.—3 *Bac. Abr.* 642.—*Rep. Cha.* 265.) Now the mortgagee cannot by his deed or last will alter the nature of estate he has in the land, so as to turn personal estate into real. His barely devising it as real estate, will not make it real estate, if it was not so before, any more than giving the money due upon the land will make the land money or persona estate.

Where there is a bond or covenant in the deed to repay the money lent, it is at law a debt; and the Court of chancery considers it in good conscience due, although there is neither bond [* 558) * or covenant to enforce the repayment; and it is upon this principle that Lord *Hardwicke* says, "that the land is but an accident;" and that justly, because if the money lent be a debt to the mortgagee, it subsists without any regard to the land, which is not essential to the debt, and is in that sense but an accident; being in fact a collateral security for the payment of the debt. But although the land be but an accident, yet it is land and not money; and the mortgagee has a legal estate in the land, and must have, to make the land any security at all to him for the payment of the debt. He cannot recover it from the mortgagor or any body else, without setting forth in his declaration the estate he has in the land, and proving it also; and it must be an estate in the land which is known in the law. This shows the necessity of keeping up the distinction between mortgages of land for a term only and mortgages in fee; between chattels that go to the executor and inheritances that descend to the heir.

Upon the whole, the futility of the allegations, "that mortgages are personal estate, that a mortgagee has no estate in the land, and that the land mortgaged, and even after it has become irredeemable, may be distributed by the judge of Probate as personal estate," is evident. Where did the Court of Probate here get the power of transmuting the real into personal estate? The ordinary has no such power; nor has that Court the powers of the Court of chan-

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cery nor even a power to make equitable assets without the aid of the Superior Court, nor with it, but of lands which the laws of the province have made liable to the payment of debts. That the widow should, by force of a decree of the judge of Probate, take land as personal estate, and thereby become the next moment seised in her demesne as of fee of it, &c., is a strange doctrine, and such a one, as, if adopted, would rip up most if not all the settlements of real estates in the province, that were mortgaged and not redeemed; as no judge has hitherto assumed the power of giving a widow lands of inheritance directly as money or personal estate.

If then a mortgagee has an estate or interest in the land, why may it not be attached and taken from him by his creditors, as well as the mortgagor's right of redemption? Is it supposable that a right to redeem the land should be liable to be attached and taken from the mortgagor for payment of his debts, and that the land itself, and the mortgagee's right in it should not? A term in *England* may be extended on an *Elegit* as part of the debtor's land, or may be delivered to his creditor at the appraised value, as part of the debtor's personal estate. (2 *Inst.* 395, 398. — 3 *Bac. Abr.* 350.) A mortgage for years is a term, and hence, might be valued and delivered in *England*, as part of the debtor's personal estate, or extended upon as part of his real estate, to be held till the debt was paid, if the term did not * expire before. A [* 559] term is assignable; and whatever is assignable may be attached and taken on execution. (*Dyer*, 72.) A mortgage in fee may also be assigned, even without actual entry, the mortgagor being but tenant at will to the mortgagee. (*Holt's Rep.* 477. — *Dyer*, 22, 270.) The mortgagee may also by his last will devise the land in fee, in which case not only the land passes, but all the mortgagee's estate in it; and the mortgagee has an estate in the land, as well as possession of it, which estate is superior to a bare right, such as the mortgagor hath, a right to redeem; and if the mortgagee doth neither convey nor devise the land, it will descend to his heirs in fee simple. It may, therefore, with the greatest propriety, be called his land; as he is seised thereof in fee simple, which, though conditional, is as large and ample an estate as a man can have in lands, though it may not be so durable. (*Co. Litt* 18, *a.*) And a creditor may take half the debtor's land in execution on *Elegit*; and consequently may take lands mortgaged in fee as well as for a term of years. A different doctrine involves us in the greatest absurdities, which appear most glaring, when we apply it to mortgaged lands in possession of a mortgagee after forfeiture.

The province law of 8 *Will.* 3, *c.* 3, provides that all lands and tenements belonging to any person in his own proper right in fee, may be taken in execution to satisfy his debts, where he doth not

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tender the officer personal property sufficient to satisfy the debt Mortgages of land in fee are either real or personal estate of the mortgagee. If real, then they are lands and tenements belonging to the mortgagee, in his own proper right in fee, (for he doth not hold the land in right of the mortgagor; but the mortgagor, if he continues in possession, holds the land in right of the mortgagee, and as his tenant,) and so are liable to be taken as his real estate in fee; in execution for his debts; and if mortgages in fee are the personal estate of the mortgagee, they may be taken as his personal estate or be tendered by the debtor, according to this act, to save his real estate; so that they may be taken either as the real or personal estate of the mortgagee, as lands mortgaged are the mortgagee's, both in law and equity, until the money is paid. 2 *Cha Ca.* 97.

The act of 6 *Geo.* 1, empowers a creditor to take his debtor's real estate in execution to satisfy the debt. This statute extends to all lands and tenements, in which the debtor has any estate, whether for years, for life, in fee simple, or fee tail; whether his estate in the land be conditional or absolute. If it be real estate, it may be taken in execution; and the creditor will thereby have an estate therein in fee, descendible to his heirs, which will last as long as the debtor's estate in the land would have continued, had it not been taken in execution. And this is all that is intended [* 560] by those words in the *statute, *viz.* "which being returned, &c., shall make a good title to such creditor or creditors, his or their heirs and assigns in fee."

If lands or tenements mortgaged are taken in execution for the debt of the mortgagee, the creditor thereby becomes a purchaser of that part so taken; and the mortgagee may redeem in a year, or the mortgagor may redeem the whole by payment of the principal sum lent and the interest, &c., or lodging it in court; in which case the mortgagee and his creditor must surrender up the land to the mortgagor, and release their rights in it, or the Court will give judgment for the mortgagor to have possession of the land, and issue execution accordingly, and deliver to the creditor the money due to him, and the mortgagee the overplus, if any there be.

Where the whole of the land is not taken in execution, the mortgagor, as well as his creditor, is to be made a party to the mortgagor's suit in equity. Then all parties interested, being before the Court, are made to do whatever is equitable. This power the Court of chancery ordinarily exercise; and the statute of 10 *Will.* 3, *c.* 13, was made to invest the inferior and superior courts with the same power. No injury can result to any one from it. Each will receive what is respectively due to him; whereas if this is not done, the mortgagee may defraud his creditor by absconding; for where there is no bond or covenant in the deed to pay the money

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lent, the mortgagor cannot be compelled to pay it. The mortgage can, by the common law courts, be considered only as a conditional sale, as in fact it is; and the mortgagor cannot be considered as a debtor to the mortgagee, nor be compelled, by any process on the act respecting absconding debtors, to pay the money. *Cro. Jac.* 281. — *Yelv.* 206.

Lord *Hardwicke*, in the case of *Harrison* vs. *Owen*, (1 *Atk.* 520,) says, "If a mortgagee cancels a mortgage, and it be found in his possession, it is as much a release as cancelling a bond; but it does not revest the estate in the mortgagor, for that must be done by some deed."

A mortgage is a debt by specialty, and the land is regarded only as a pledge or security for the money in chancery; and the mortgagee may take his remedy against the heir or executor. 2 *Tra Atk.* 435.

Authorities showing the estate, both legal and equitable, to be in the mortgagee. 2 *Atk.* 352 — 4. — 2 *Cha. Ca.* 97. — 1 *Cha. Ca.* 285.

The heir of the mortgagor need not bring the original mortgagee before the Court, when he has assigned the mortgage; as the assignee is considered as standing in his place, and will be decreed to convey. 2 *Atk.* 39.

The lands devised to executors for payment of debts will not be assets at law in their hands; although when sold the purchase money becomes legal assets. 2 *Vern.* 106.

When a devise of a mortgage in fee passes in fee. *Cro Car.* 447.

When there is a bond and mortgage, and the land is insufficient to pay the debt, the Court of chancery will order the land to be sold, that the creditor may recover the sum remaining due upon the bond. *Abr. Eq. Ca.* 312.

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A TABLE

OF THE PRINCIPAL MATTERS.

ABATEMENT.

See PRACTICE, 9.

ACTION.

1. A private statute incorporated certain members of a voluntary association for charitable purposes, and authorized them to receive to their use all moneys due to the association, and to give receipts for the moneys which they should receive; which receipts might be given in evidence in any action that might afterwards be brought on any obligation made to the association: — It was holden that the corporation could give effectual discharges to the debtors of the association: — But whether they could support actions against such debtors, — or whether they would not be liable to the members of the association for the moneys received, — *Quære*. *The Scots Charitable Society* vs. *Shaw, Adm.* 532

ADMINISTRATORS.

See EXECUTORS, &c.

ADMIRALTY.

See INSURANCE, 10.

ADVANCEMENT.

1. Where a child, in consideration of a sum paid him by his father, by way of advancement, releases his claim to his share of the inheritance; although it may appear that the sum so paid was much less than his purparty of his father's estate at his death would have been worth, it shall nevertheless bar him of his share or purparty. *Kenny & Ux* vs. *Tucker.* 143

AGENT.

See BILLS OF EXCHANGE, &c., 2.
FOREIGN ATTACHMENT, 4.

AGREEMENT.

1. One, in consideration of a dollar paid him, agreed by his deed not to run a stage on a certain road specified, under penalty of two hundred and ninety dollars; — the agreement was held valid, and the penalty mentioned was considered as the damages liquidated by the parties. *Peirce* vs. *Fuller.* 223

ALIMONY.

See DIVORCE, 1.

APPEAL.

1. By an appeal from a decree of the Court of Probate, accepting the return of commissioners for the division of an estate, the return is opened to every objection that could lawfully have been made to its acceptance in the court below. *Sever* vs. *Sever.* 132

See COSTS, 1.
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APPRAISERS.

See EXECUTION, 1, 3, 4, 6.

APPRENTICE

1. An apprentice is not assignable. *Davis* vs. *Coburn.* 299

ARBITRATOR.

See AWARD, 1.

ARSENALS.

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ASSIGNEE.

See EXECUTORS, &c., 4.

ASSESSORS.

1. Where one was assessed for lands lying in a school district, in which they were not legally taxable, but which he had requested the assessors to place to his account of taxable property, and informed them that he was to be taxed for it; — it was holden that the assessors were not liable to an action of trespass for making such assessment. *Pease* vs. *Whitney & Al.* 93

ASSUMPSIT.

See BOTTOMRY, 1.
FOREIGN JUDGMENT, 1.

ATTACHMENT.

See PLEDGE, 1.
EXECUTION, 5.
BILL OF SALE, 1.

ATTORNEY.

1. Whenever an attorney disobeys the lawful instructions of his client, and a loss ensues, the attorney is responsible for such loss. *Gilbert* vs. *Williams.* 51

AWARD.

1. In debt on bond to perform an award, the defendant after oyer alleges a performance of the award, by payment two days after the award, to the partner of the plaintiff (not party to the bond, but whose joint concerns with the plaintiff were referred to the arbitrator) of three several sums of money awarded to be paid by him; the plaintiff replies a demand by himself on the day of the award made, and a refusal by the defendant: — the replication was adjudged bad. *Peters* vs. *Peirce.* 398

BAIL.

1. It is not a sufficient excuse for bail not surrendering their principal, that he is confined in the state's prison. *Parker* vs. *Chandler.* 264

2. After final judgment, bail cannot surrender their principal in court. *Rice & Al.* vs. *Carnes.* 490

BANKRUPT.

See PLEADING, 2.
EXECUTORS, &c., 4.

BANKS.

1. The statute of 1809, c. 37, § 1, imposing a penalty of two per cent., per month on the amount of bills of any bank of which payment is by such bank refused, militates with no principle of the constitution, either of the *United States* or of this commonwealth. *Brown* vs. *The Penobscot Bank.* 445

2. By an act of the state of *New Hampshire* creating a banking corporation, it was provided, that if the corporation should refuse or neglect to pay their bills on demand, the original stockholders, their successors, assigns, and the members of the corporation should, in their private capacities, be liable to the holders of the bills: — It was held that such only of the original stockholders, their successors, &c., as were members of the corporation at the time when payment was refused, were liable. *Bond* vs. *Appleton.* 472

BILL OF SALE.

1. Where a bill of sale was made by one part owner of a vessel to another, the vessel then being in another port than that where the sale was made, and the vendee claimed possession of her on her arrival a few days after at the port of his residence, the sale was held valid and good against a creditor of the vendor, who had caused her to be attached immediately after the execution of the bill of sale. *Putnam* vs. *Dutch.* 287

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A promissory note, given in consideration of the assignment of a patent right which had been fraudulently obtained, was held void, although certain materials had been furnished, and certain instructions given, by the promisee to the promiser, in the art described in the patent. *Bliss & Al.* vs. *Negus.* 46

2. A promissory note was given to *A B*, agent of a manufacturing company; held, that an action lay for *A B*, on the note, and his styling himself agent, &c., in his writ and declaration was merely

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descriptio personæ. *Buffum* vs. *Chadwick*. 103

3. Where the promiser in the note of hand, had left the commonwealth before the maturity of the note, and the holder left a demand at his dwelling-house on the day the note fell due, and on the same day gave notice to the endorser that the note was unpaid, and requested payment, the endorser was held liable although not informed of the absence of the promiser. *Sanger* vs. *Stimpson*. 260

4. A promissory note made payable in a given number of days, without saying more, is payable in so many days from the date, exclusive of the day of the date. *Henry* vs. *Jones*. 453

5. Upon a note made payable in a certain number of years, *with interest annually*, judgment can be recovered only for simple interest on the principal sum. *Hastings* vs. *Wiswall*. 455

6. Where a bill of exchange is protested for non-acceptance, a right of action accrues immediately to the holder; he is not bound to present it at maturity for payment; nor if he does, is his right of action on the non-acceptance affected thereby. *Lenox* vs. *Cook*. 460

7. When a note has been paid by the last endorser, it ceases to be negotiable; but his assignee may maintain an action upon it against the prior parties in the name of the assignor; and the Court will prevent his interference to defeat the action. *Boylston* vs. *Greene*. 465

8. In an action against one of several joint promisers, in a note of hand, it is no bar that one of the promisers, other than the defendant, has paid his share, and been discharged by the promisee. *Call* vs. *Hager & Al*. 423

9. It is no bar to an action on a promissory note for the payment of money at a day and place certain, that the holder of the note was not present at the time and place fixed for payment. *Ruggles* vs. *Patten*. 480

BLOCKADE.

See ORDERS IN COUNCIL, 1.

BOND.

1. A bond given by a county treasurer, for the faithful discharge of his office, is intended to protect the public during the year only for which he was elected. *Bigelow* vs. *Bridge*. 275

2. *A*, for a consideration paid by *B*, conveys land to *C*, in fee; whereupon *C* executes a bond to *B*, conditioned that he will convey the same to any person whom *B* shall appoint: — It was holden that no estate in the land vested in *B*. *Storer* vs. *Batson*. 431

See BOTTOMRY, 1.
JAIL, 1, 2, 3.
REPLEVIN, 1, 2, 3.

BOTTOMRY.

1. Money was lent on a bottomry bond, with condition to be void on payment of the sum borrowed, with the stipulated marine interest, within twenty days after the arrival of the vessel at her port of discharge in this commonwealth; or if she should be lost through the perils of the seas, or by fire, or by the enemies of the *United States*, while performing the intended voyage: — The vessel was captured by the British on her return voyage, and condemned in the vice-admiralty court as prize; — on an appeal the decree of condemnation was reversed, and restoration ordered; and afterwards the commissioners under the treaty of 1794, awarded to the owner the value of his vessel and freight, with interest: — In an action of *assumpsit* for money had and received by the lender against the owner, it was held that he was entitled to recover the sum lent, and the interest thereof received by the owner under the award of the commissioners. *Appleton* vs. *Crowninshield*. 340

CERTIORARI.

See HIGHWAYS, 1.

CHARITABLE ASSOCIATION

See ACTION, 1.

CONSIDERATION.

See BILLS OF EXCHANGE, &c.

CONTRIBUTION.

1. The masts, spars, rigging, and sails of a vessel at sea were carried away by the violence of the weather, and after hanging by the vessel's side for half an hour were cut loose for the

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preservation of the vessel and cargo; afterwards being met by another ship, part of the cargo was taken on board the ship, and brought into port, the wreck being left; a salvage of one third of the cargo saved was decreed to the salvors; — and it was held that the owner of the cargo saved was not liable to the owner of the vessel lost for a contribution to the loss of the masts, &c. *Nickerson & Al.* vs. *Tyson.* 467

COPARTNERS.

1. Where three or more copartners have contributed severally, and in different proportions, to the joint stock, and one of them withdraws from the copartnership in violation of their mutual agreement, each has his several remedy for a breach. *Dunham* vs. *Gillis.* 462

COSTS.

1. In an action on a simple contract the *ad damnum* was more than fifty dollars; — at the Common Pleas the plaintiff had judgment for thirty-nine dollars; the defendant appealed, entered his appeal, and afterwards suffered a default: — It was held that the appeal lay, and that the plaintiff was entitled to double costs in this Court. *Stone* vs. *Kelly.* 98

2. In debt upon an administration bond, brought in the name of the judge of Probate, costs were awarded against the party for whose benefit the suit was commenced. *Dawes* vs. *Gooch.* 488

See REPLEVIN, 1.
PRACTICE, 8.

COVENANT.

1. Administrators of an insolvent estate, under a license of court to sell the real estate of their intestate for the payment of his debts, sell an equity of redemption, of which their intestate was supposed to die seised, (the grantees at the same time purchasing an assignment of the mortgage;) and in their deed the administrators covenant, *in their said capacity of administrators*, that they, *as administrators*, are lawfully seised of the premises, that they are clear of all incumbrances, except the mortgage and the right of dower of the intestate's widow, that they have in *their said capacity*, good right to sell, &c., and that *as administrators* they will warrant and defend the same to the grantees and their heirs, &c., against the lawful claims of all persons; and they sign and seal the deed as *administrators*: — In action against them upon covenant to warrant, &c., after an eviction by a paramount title, it was holden that they were answerable personally on their covenants; and that the measure of damages was the consideration money and interest, with the costs that had arisen to the grantees in defending against the suit, by which they had been finally evicted; and not including the money paid for the assignment of the mortgage, nor for the release of dower by the intestate's widow. *Sumner, Adm.*, vs. *Williams & Al.* 162

See DAMAGES, 1, 2.
EVIDENCE, 3.

COUNTERFEITING

See INDICTMENT, 1, 2.

COUNTY TREASURER.

See BOND, 1.

COURTS.

1. The courts of the commonwealth cannot take cognizance of offences committed upon lands in the town of *Springfield*, which have been purchased by the *United States*, for the purpose of erecting arsenals, &c., to which purchase the consent of the commonwealth was granted by the statute of 1798, *c.* 13. *Commonwealth* vs. *Clary.* 72

2. Offences against the statute of 1791, *c.* 58, for the due observation of the Lord's day, are not originally cognizable in this Court. *Commonwealth* vs. *Johnson.* 87

DAMAGES.

1. The rule established, that in an action upon a covenant of seisin the plaintiff shall recover only the money paid for the land and interest, applies to actions brought upon conveyances of land in other states, as well as to conveyances of land in this commonwealth. *Nichols* vs. *Walter & Al., Exrs.* 243

2. The covenantee in an action upon a covenant of warranty in a conveyance of land is entitled to nothing more than the consideration paid and interest,

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until after eviction. *Harris & Al.* vs. *Newell.* 262

See AGREEMENT, 1.
COVENANT, 1.

DEED.

1. Of the effect of the delivery of a deed, and when it shall be considered as an escrow. *Fairbanks, Adm.,* vs. *Metcalf.* 230

DELIVERY.

See DEED, 1.

DEVISE.

1. *A* devises sundry parcels of land to his nephews, *B & C*, severally and in distinct parts, to have and to hold the parts devised to *B*, *to him, his heirs and assigns forever, on the conditions and limitations after in his will mentioned*; — and to have and to hold the parts devised to *C*, *to him, his heirs and assigns forever, on the conditions and contingencies after mentioned in his will*; — the testator then adds, "*and it is my will and pleasure, and I have made the foregoing devises and bequests with the provision and limitation, that if it should so happen that the said B should decease,* leaving *no heirs of his body lawfully begotten, and the said C,* or any heirs by him the said *C* lawfully begotten, *then alive, that in such case all the devises and bequests of real estate hereinbefore made to the said B, should be and remain to him the said C,* or such his said heirs. — *And in case the said C should decease,* leaving *no heirs of his body begotten, living the said B* or any heirs of his body lawfully begotten, *in such case all the lands herein before devised to the said C, shall be and remain to the said B, or such his said heirs. — But in case both the said B & C should decease, leaving no heirs of either of their bodies begotten, then all the lands herein before given to the said B & C, or either of them,* shall be and remain to the children of my brethren and sister *who shall then survive.*" — This was holden to be a devise to the two nephews in tail, with cross remainders in tail, and a contingent remainder to the children of the testator's brethren and sister living when these estates tail should be spent. *Hawley & Al.* vs. *Northampton.* 3

2. A devise to husband and wife creates a joint tenancy, notwithstanding the statute of 1785, c. 62. *Fox* vs *Fletcher.* 274

3. One devised his estate to his wife, "*to be for her own comfort and the support of my children who are minors, during the time she remains my widow, without any disturbance, &c., from any of my children; and in case she alters her condition by marriage, then to be divided as the laws directs, each child to receive an equal portion:*" — Held that the children took a vested remainder. *Bates & Ux.* vs. *Webb & Al.* 458

See EVIDENCE, 5.

DIVORCE.

1. After a divorce *a vinculo* had been decreed by the Supreme Court of the state of *Vermont*, the wife brought her action here, to recover of the husband the proceeds of certain promissory notes given to her before the marriage, which were received by him after the divorce; and she had judgment; the Court refusing parole evidence, that the Court of *Vermont*, in settling the wife's alimony, took into consideration the said proceeds as belonging to the husband, when they should be received by him. *Leg* vs. *Leg.* 99

2. Where a libel for a divorce *a vinculo* for adultery charged the crime as committed without the commonwealth, there being an appearance for the respondent, evidence was received of the fact committed at a place within the commonwealth. *Washburn* vs. *Washburn.* 131

See PRACTICE, 6.

DOWER.

1. Where the wife joined her husband in a mortgage, relinquishing her claim of dower, and after the death of the mortgagor, the purchaser of the equity of redemption paid the money due on the mortgage, and the mortgagee acknowledged the discharge on the record: — It was held that the widow of the mortgagor was barred of her dower. *Popkin* vs. *Bumstead.* 491

ERROR.

1. Error does not lie to reverse a judgment on the ground that a promissory note, filed in support of the action

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by the endorsee, was not negotiable. *Pierce* vs. *Adams*. 383
2. It is an improper practice to insert the particular errors in the writ of error; they should be stated in the *scire facias* to hear errors. *Ibid.*

ESCAPE.

See JAIL, 1, 2.

ESCROW.

See DEED.

EVIDENCE.

1. Parole evidence may be admitted that an executor has posted up notifications of his appointment, &c., pursuant to *stat.* 1788, c. 66, § 1, without producing one of the original advertisements or a copy; and such evidence will be good to bar a recovery in an action commenced against the executor more than four years after his giving bonds. *Green* vs. *Gill, Exr.* 111
2. An inquisition by the selectmen that one is *non compos*, and an appointment of a guardian for that cause, are not justified by evidence that the person is old, and has become less careful of his property. *Darling* vs. *Bennet.* 129
3. In covenant broken upon a conveyance of land with warranty, it is not competent for the defendant to give parole evidence that the plaintiff had knowledge of the title by which he had been evicted, and agreed that the defendant should not be charged in the event of such an eviction. *Townsend* vs. *Weld.* 146
4. Where a defendant producing a witness, had declared that it belonged to such witness, as well as himself, to pay the demand sued, the witness could not be sworn. *Pierce* vs. *Chase.* 487
5. Parole evidence of declarations made by a testator, before or after making his will, are not to be received in explanation of his intentions in any bequest contained in the will. *Richards, Adm.*, vs. *Dutch & Al.* 506
6. Where one said *he would venture any thing the plaintiff had stolen the book*, the words being proved to be spoken maliciously, were held to support a verdict for damages. *Nye* vs. *Otis.* 122

See FOREIGN JUDGMENT, 1, 2, 3.
SETTLEMENT, 1, 4.
SLANDER, 1
WILL, 1, 2.
EXECUTION, 1.

EXECUTION.

1. A creditor's choosing an appraiser and receiving seisin of lands upon execution, are sufficient evidence of his election to extend his execution upon the real estate of his debtor, although the sheriff does not certify such election. *Herring & Al.* vs. *Polly.* 113
2. A judgment creditor may extend his execution upon the real estate of his debtor, although there may be sufficient personal estate to satisfy his execution; and notwithstanding he may have attached such personal estate on his original writ in the same suit. *Ibid.*
3. If one of two judgment debtors elect an appraiser to appraise land belonging to them both, or to him only, it is sufficient; otherwise, if the land belong to the other debtor. *Ibid.*
4. In the extent of an execution on land, the three appraisers must certify; or if two only certify, a sufficient reason must appear on the return why the third did not; — if the officer appoints two of the appraisers, it must appear from his return, that the judgment debtor refused: — Such extent must be recorded within three months, to avoid a *bona fide* mesne conveyance of the land *Whitman* vs. *Tyler & Al.* 284
5. Where an act incorporating an insurance company prescribed a particular manner, in which the shares of members in the stock were to be attached and sold on execution; — it was held that such provision superseded the general provision on the same subject contained in the previous statute of 1804, c. 83. *Titcomb* vs. *The Union Insurance Company.* 326
6. When land of a debtor is set off on execution, to which no access can be had, but over other lands of the debtor, the sheriff and appraisers may set off to the creditor a right of passage over such other lands, either separately or jointly with the debtor. *Taylor* vs. *Townsend.* 411

See SHERIFF, 1.

EXECUTORS AND ADMINISTRATORS.

1. An administrator may not charge,

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in his administration account, the expenses of the support and education of the infant child and heir of his intestate. *Brewster* vs. *Brewster*. 131

2. In an action against the administrator of an insolvent estate, who had been guilty of laches in the Probate Court, by a creditor whose claim had been allowed by the commissioners, judgment was rendered for the amount of the dividend awarded the plaintiff by the judge of probate. *Pierce* vs. *Whitemore*. 282

3. Where administration is granted here, upon a will proved in a foreign country, pursuant to the statute of 1784, c. 12, the administrator may be holden to pay the testator's debts to creditors here, but not to pay legacies; for which the legatees must resort to the country, where the will was originally proved, and where the testator had his domicil. *Richards, Adm.*, vs. *Dutch & Al.* 506

4. An action against the assignee of a bankrupt does not survive against the administrator of such assignee. *Hall* vs. *Cushing, Admr.* 521

See LIMITATION, 1.
COVENANT, 1.
FOREIGN ATTACHMENT, 2.

FOREIGN ATTACHMENT.

1. Where one summoned as trustee had made a promissory note, payable to the wife of the defendant, for a consideration arising wholly from her property, he was adjudged the trustee of the husband. *Shuttlesworth* vs. *Noyes & Trustee*. 229

2. An administrator cannot be holden as the trustee of a creditor of the estate of his intestate. *Brooks* vs. *Cook & Trustee*. 246

3. *A* having assigned all his property to *B*, in trust for his creditors, and the same being afterwards taken out of *B*'s possession by attachment at the suit of certain of *A*'s creditors, *B* was afterwards summoned as the trustee of *A* in a foreign attachment, and held as such. *Parker* vs. *Kinsman & Trustee*. 486

4. An agent of a fire insurance company, established in a foreign country, having executed a policy, on which a supposed loss had arisen, was not therefore held the trustee of the assured. *Wells* vs. *Greene & Trustee* 504

See PRACTICE, 1.

FOREIGN JUDGMENT.

1. *Assumpsit* lies on a judgment of a foreign court; but such judgment is only *prima facie* evidence; and the defendant has all the benefits he would have in an action for the original cause. *Buttrick & Ux.* vs. *Allen*. 273

2. The affidavit of one who assisted the clerk of the foreign court in comparing the copy, &c., and saw him attest it, is a sufficient verification of the copy of the judgment. *Ibid.*

3. The defendant in such action, where the former judgment was rendered on his default, may avoid it by showing that he was not within the jurisdiction of the foreign court. *Ibid.*

JAIL.

1. A prisoner, having given bond for the liberty of the yard, committed no escape by passing the nights in a house hired and appropriated by the sessions for the use of debtors who had given bonds, although the keeper of the jail exercised no control over such house. *Jacobs* vs. *Tolman*. 161

2. Where the sessions had assigned certain apartments in the jailer's house, which was within the limits of the jail yard, as the chambers and lodging of debtors having the liberty of the yard, and such a debtor had passed his evenings in another chamber of the same house, with the permission of the sheriff and jailer, but had always slept in one of the rooms assigned by the sessions, he was held to have committed an escape within the condition of his bond. *Burroughs* vs. *Lowder & Al.* 373

3. Such bond is good at common law although not taken in double the amount for which the prisoner stands committed; — and although the sureties therein are not inhabitants within the county; and in every such case the creditor shall recover the amount of his debt with interest. *Ibid.*

4. The statute of 1809, c. 33, § 2, by which suits on bonds given for the liberty of the prison-yard are limited to a year after the breach, does not apply to actions for breaches committed before

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the passing of the act. *Call* vs. *Hagger & Al.* 423

GUARDIAN.
See EVIDENCE, 2.

GRAND JUROR.
1. The Court will not set aside a grand juror, because he has been the prosecutor of a person charged with a capital crime, whose case may probably be brought before the grand jury. *John Tucker's case.* 286

HIGHWAYS.
1. It is a sufficient ground for the Common Pleas to discontinue a highway, that it has become *useless*. *Commonwealth* vs. *Roxbury.* 457
2. Upon a *certiorari* to the Common Pleas, this Court will not go into the question of the expediency of discontinuing a highway. *Ibid.*

INDICTMENT.
1. To an indictment upon the second section of the *stat.* 1804, *c.* 120, for having in possession ten or more counterfeit bank bills, it is no sufficient objection that it is alleged that such bills purport to be bills of such a bank; — that they were payable to the bearers thereof; — that they are not alleged to be similar bills; that they are described as promissory notes *or* bank bills; or that it is not alleged that the party charged had knowledge of the false making, &c. *Brown* vs. *The Commonwealth, in error.* 59
2. In such an indictment it is necessary to describe the bills charged to be counterfeit, or to set forth a sufficient reason why they are not so described. *Commonwealth* vs. *Houghton.* 107
3. There is no statute provision for the punishment of the crime of breaking and entering a warehouse in the night time. *Commonwealth* vs. *Carroll.* 490

INDORSEMENT OF WRITS.
See PRACTICE, 3, 4.

INQUISITION.
See EVIDENCE, 2.

INSOLVENT ESTATES.
See EXECUTORS, &c., 2.

INSURANCE.
1. Where a loss by capture of a neutral ship arises from the negligence of the master, in leaving the ship's register, &c., on shore, the underwriters are not liable. *Cleveland* vs. *The Union Insurance Company.* 308
2. On the trial of an action on a policy of insurance, the judge directed a nonsuit, on the ground that there had been a fraudulent concealment of material facts at the time of effecting the insurance; and the Court refused to set aside the nonsuit, and grant a new trial, observing that if the jury had found a verdict for the plaintiff, they should have set the verdict aside. *Hoyt* vs. *Gilman.* 336
3. An agreement had been entered into between *A B*, an underwriter, and the assured in a policy of insurance, to abide the final determination of an action pending between the same assured and an incorporated company, who had insured for them upon the same risk. On the trial of that action in this Court, the demand was not contested by the company, they submitting to a verdict against them, under the expectation of prosecuting a review, which they accordingly prosecuted and entered, having given bond therefor. — An adjustment afterwards took place between the parties to the action, the company paying the assured two thirds of a total loss, and relinquishing their claim to salvage; and the review was discontinued. — It was held that *A B* was not bound by his agreement to adjust with the assured on the terms on which the company had adjusted the loss on their policy. *Higginson & Al.* vs. *Gray.* 385
4. The plaintiffs insured for the defendants the freight to be earned by their ship in a voyage from *Teneriffe* to *Jamaica.* The ship being captured by the *French* and re-captured by the *English*, a salvage of one half was decreed to the re-captors — The balance of freight being paid into the master's hands, he delivered it to the owners, the defendants who claimed a total loss of the plaintiffs. — This was paid pursuant to the opinion of arbitra-

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tors, neither the plaintiffs nor the arbitrators then knowing that the defendants had received any part of the proceeds from the cargo as freight. The defendants afterwards remitted the money received by them to the freighters; and they were held not to be accountable to the plaintiffs the underwriters. *Newburyport Marine Insurance Company* vs. *Oliver & Al.* 402

5. A ship bound to *China* being insured, was captured by a *British* cruiser for a supposed breach of blockade, and was carried into *Canton*, and there detained; afterwards being taken to *Calcutta*, she was there libelled and condemned. The assured heard of her detention at *Canton*, but did not then abandon; six months afterwards having advice of the condemnation, he immediately abandoned, and it was held seasonable. *Dorr* vs. *The Union Insurance Company.* 494

6. A policy of insurance contained the following memorandum, "*In case of capture or restraint, the assured is not to abandon until the property is condemned, or until it shall have been proved to have been ninety days under detention.*" The property insured was seized and had been detained more than ninety days, when the assured first heard of the seizure; who thereupon abandoned to the underwriters; but at the time of the abandonment the property had been restored to the agent of the assured; and it was holden that the underwriters were not bound to accept the abandonment. *Dorr* vs. *The Union Insurance Company.* 502

7. None but the assured in a policy of insurance, or their legal representatives in case of their death, can avail themselves of the contract; except in case of the transfer of the vessel, and an assignment of the policy, with the assent of the underwriter thereto, either express or implied. *Carroll* vs. *The Boston Marine Insurance Company.* 515

8. A cargo was insured from *Boston* to the port of discharge in *Europe*, against all risk of every name and nature, (bad debts and illicit trade excepted;) it being understood by the parties that the vessel was intended for some port in *Holland*, or wherever the master should deem proper, in case she could not get into *Holland*; — The vessel arrived in the *Maese*, and might have gone to *Rotterdam*; but the master, learning that if he proceeded to *Rotterdam*, the property would be confiscated, left *Holland* and proceeded to *Gottenburg*, and in going from thence for a market in the *Baltic* the vessel was captured by the *Danes*, and with the cargo condemned as prize. It was held that neither the departure from *Holland*, nor the going from *Gottenburg* for a market, was a deviation; but that the property was still protected by the policy, and the underwriters bound to pay the loss. *Coolidge & Al.* vs. *Gray.* 527

9. A *rescue* by the crew of a neutral vessel, arrested and detained by a belligerent armed vessel for an alleged breach of neutrality, is a good cause of condemnation by the belligerent; and a loss happening from such a cause is not within the perils usually insured against by a policy of insurance. *Robinson & Al.* vs. *Jones.* 536

10. The sentences of foreign Courts of Admiralty are conclusive only when they distinctly and specifically state the cause of condemnation; therefore, where a vessel and cargo were condemned for a rescue from the possession of a belligerent captor, *or otherwise*, the assured were permitted to give evidence disproving the alleged rescue. *Ibid.*

See FOREIGN ATTACHMENT, 4.

JOINT TENANCY.

See DEVISE, 2.

JUDGMENT.

See EXECUTORS, &c., 2.
FOREIGN JUDGMENT, 1, 2, 3.
INSURANCE, 3.

JURISDICTION.

See COURTS, 1, 2.

JUSTICES OF THE PEACE.

1. A justice of the peace cannot require one to find sureties of the peace, but until the next court; nor can he sentence one to the payment of costs, who refuses to find sureties. *Commonwealth* vs. *Morey.* 76

LEGACY.

See EXECUTORS, &c., 3.

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LIBEL.

See DIVORCE, 2.
PRACTICE, 6.

LIMITATION.

1. An admission within six years of a promise or contract as undischarged, which would otherwise be barred by the statute of limitations, takes such promise or contract out of the statute. — And if such admission be made to an executor or administrator, there needs no special count to be made in such case. *Baxter, Adm.*, vs. *Penniman.* 133

LOTTERY.

1. The holder of a prize ticket in a lottery may demand the prize money of all the managers, although the tickets are respectively signed by one only: but where the holders had given up the tickets to one of the managers, taking his personal promise for the amount due upon them; they were held to have thereby relinquished their claim on the other managers, and to have a right of action only against him, whose receipt they had taken for the tickets. *Gilbert & Al.* vs. *Williams & Al.* 476

MARKET OVERT.

1. There are no markets overt in this commonwealth; and a sale in the public market-place in *Boston*, of an article usually sold there, by one who had feloniously acquired the possession of the article sold, was held not to transfer the property. *Dame* vs. *Baldwin.* 518

MILITIA.

1. A warning in writing in good form left at the house of a soldier by a stranger, under the direction of a non-commissioned officer, is sufficient. *Commonwealth* vs. *Cutter.* 279

2. One who has served seven years in a volunteer corps, is *ipso facto* entitled to his discharge; and after demanding it, is no longer liable to a fine for neglecting to attend a muster of the corps. *Ibid.*

3. The commanders in chief of the militia of the several states have a right to determine whether any of the exigencies contemplated by the constitution of the United States exist, so as to require them to place the militia or any part of it, in the service of the United States, at the request of the President, to be commanded by him, pursuant to acts of congress. 548

4. When either of the said exigencies exist authorizing the employing of the militia of the United States, the militia thus employed cannot be lawfully commanded by any officer but of the militia, except by the President of the United States. *Ibid.*

MORTGAGE.

1. An agreement was made in writing, that a deed to be executed should be deposited with a third person, until a sum of money, advanced by the grantee to the grantor, should be repaid, or until a day specified, and in default of such repayment at the day it should be delivered to the grantee, who might thereupon enter, &c. — It was held that such deed, together with the agreement, constituted a mortgage. *Carey* vs. *Rawson.* 159

2. A mortgagee, after a recovery on a bill in equity to redeem, and before possession taken under the judgment, may lawfully take down and carry away any buildings erected by him on the land mortgaged, the materials of which were his own, and not so connected with the soil, as that they cannot be removed without prejudice to it. *Taylor* vs. *Townsend.* 411

See DOWER, 1.

NON COMPOS.

See EVIDENCE, 2.

NOTICE.

See BILLS OF EXCHANGE, &c., 3.

ORDERS IN COUNCIL.

1. The British orders in council of July, 1808, raising the blockade of the ports of *Spain*, extended to the colonies of *Spain*. *Dorr* vs. *The Union Insurance Company.* 494

PATENT.

See BILLS OF EXCHANGE, &c., 1.

PARISH.

See STATUTES, 1.

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PAUPER.

See SETTLEMENT, 1, 2, 3, 4.

PAYMENT OF MONEY INTO COURT.

See PRACTICE, 2.

PLEADING.

1. A general count in an action for defamation, as for *charging the plaintiff with stealing*, is good. *Nye* vs. *Otis*. 122

2. In debt on judgment, the defendant pleads his discharge under a commission of bankruptcy; the plaintiff replies that the defendant afterwards waived that advantage, and promised to pay the amount of the judgment. Issue was taken on the promise, which being found for the plaintiff, he had judgment for his debt. *Maxim* vs. *Morse*. 127

3. To a replevin bond the defendant pleads in bar, that he duly entered his action at the Common Pleas, and prosecuted it with effect, — that upon a judgment there, an appeal was interposed by the plaintiff in replevin; — that the creditor, at whose suit the chattels had been attached, had received full satisfaction for his damages and costs, and that the officer, plaintiff in the action on the bond, had been indemnified, and kept harmless, &c., and on demurrer to this plea, the defendant had judgment. *Arnold* vs. *Allen & Al.* 147

4. In debt upon an administration bond against a surety, the principal being dead, the defendant pleaded performance generally, the plaintiff demurred because a special performance of each article of the condition was not averred in the plea: the plea was adjudged sufficient. *Dawes* vs. *Gooch*. 488

5. The plaintiff moved for leave to waive the demurrer and reply. This motion was denied, particularly because the bond was of long standing, &c. *Ibid.*

See AWARD, 1.
BILLS OF EXCHANGE, &c., 2, 8, 9.
SLANDER, 1.

PLEDGE.

1. Where a creditor has received from his debtor a personal chattel in pledge, as collateral security for the debt, he cannot cause other property of the debtor to be attached in an action for the debt, without first returning the pledge. *Cleverly* vs. *Brackett & Al.* 150

POOR.

See SETTLEMENT, 1, 2, 3, 4.

PRACTICE.

1. By the practice of the courts in this state, judgment is presumed to be entered on the last day of the term; unless on motion it be in fact entered previously, in which case the time is minuted; and the thirty days, during which goods and estate attached on mesne process are held, are to be reckoned accordingly. *Herring & Al.* vs. *Polly*. 113

2. In *assumpsit* for not paying a sum of money in bank notes, the defendant pleaded a tender, and a *profert* of the notes into court; after issue joined on the tender and found for the defendant, it appearing that the notes had not been brought into court, the plaintiff had judgment *non obstante veredicto*. *Claflin* vs. *Hawes*. 261

3. An original writ, prosecuted by a corporation, was endorsed thus, "*The* ——— *Corporation by A. B*," and it was held a sufficient endorsement; and the same remedy may be had against the endorser, as if he had written his name only. *The Middlesex Turnpike Corporation* vs. *Tufts*. 266

4. Where the plaintiff had endorsed the original writ, and had afterwards absconded and left the state, a new endorser was ordered to be furnished. *Oystead* vs. *Shed & Al.* 272

5. Where a counsellor and attorney of this Court held a paper delivered to him by his client, which the grand jury were desirous of seeing, the Court held him not bound to produce it. *Anonymous*. 370

6. Where, upon a libel for a divorce filed in the clerk's office, and served by leaving a summons at the respondent's last usual place of abode, it was suggested to the court that he was out of the state, personal notice was ordered to be given, returnable at the present term; which being done, the court proceeded to hear and determine the cause. *Labotiere* vs. *Labotiere*. 383

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In an action against six several obligors, service was made on five only, and as to the sixth the officer certified that he had no last and usual place of abode in his county; the defendants, on whom service had been made, moved that the proceedings should be stayed for want of service on the sixth, whom they suggested to be an inhabitant of the commonwealth, and within the reach of process. — The motion was overruled, and the action proceeded against the five who had been served with process. *Call* vs. *Hagger & Al.* 423

8. An endorser of an original writ is not answerable to the defendant for costs taxed pursuant to the statute of 1803, *c.* 155, § 5, where the plaintiff having appealed recovers judgment for a less sum than fifty dollars, and costs are given to the defendant. *Fairbanks* vs. *Townsend.* 450

9. It is no cause to abate a writ, that the defendant has been sued as the trustee of the plaintiff, and that the process is still pending; but it is ground for a continuance while the process is pending; and during such continuances the plaintiff may not tax costs for travel and attendance. *Winthrop* vs. *Carlton.* 456

See SETTLEMENT, 3, 4.

PRISON.

See JAIL, 1, 2, 3, 4.

PROBATE COURT.

See APPEAL, 1.

PROMISSORY NOTES.

See BILLS OF EXCHANGE, &c.

PUBLIC TEACHER.

1. A person officiating as a reader in an Episcopal church, without ordination, is a public teacher within the constitution. *Sanger* vs. *3d Parish in Roxbury.* 265

2. Nor is it any objection to his recovering taxes paid by his hearers to another teacher, that he was engaged by contract for part of a year only, provided such contract was renewed and continued for a whole year. *Ibid.*

REFEREES.

1. Referees appointed pursuant to the statute of 1786, *c.* 21, have no jurisdiction of questions concerning the title to real estate. *Fowler* vs. *Bigelow & Ux.* 1

REMAINDER.

See DEVISE, 1.

REPLEVIN.

1. In debt on a bond to prosecute a writ of replevin, the plaintiff is entitled to recover the value of the goods replevied, with the damages and costs recovered in the writ of replevin and interest on such damages and costs from the date of the judgment in replevin to the time of rendering judgment on the bond. *Arnold* vs. *Baily & Al.* 145

2. The condition of a replevin bond was to prosecute the action at the *county court* next to be holden at, &c., rightly describing the next term of the common pleas, and held good. *Arnold* vs. *Allen & Al.* 147

3. It is no sufficient ground to quash a writ of replevin, that the officer has taken bond for a larger sum than the writ directed. *Clap* vs. *Guild.* 153

See PLEADINGS, 3.

RESCUE.

See INSURANCE, 9, 10

SALE.

See MARKET OVERT.

SALVAGE.

See CONTRIBUTION, 1.

SANITY.

See WILL, 1, 2.

SCHOOL DISTRICTS.

See ASSESSORS, 1.

SEAMENS' WAGES.

1. Where there was a contract by the master of a ship in a foreign country for the sale of the ship, and a delivery in pursuance of such contract, with an agreement that the new employers should victual and man her; it was holden that the former owners were not liable for the wages of the seamen accruing after the contract, and before the sale was completed. *Aspinwall, Adm.*, vs. *Bartlet.* 483

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SETTLEMENT.

A notice to a town to be charged with the support of a pauper, signed by one overseer by order of the whole, is sufficient within the statute of 1793, c. 59, § 12. *Westminster* vs. *Bernardston.* 104

2. Such notice, not duly objected to, is a bar to a defendant town, as to the question of the pauper's settlement, although it appears that such pauper had no legal settlement in any town within the commonwealth. *Ibid.*

3. In a complaint, and also in an adjudication for the removal of a pauper, it is required to state the cause of the likelihood of his becoming chargeable. *Walpole* vs. *West Cambridge.* 276

4. It is not sufficient for the Common Pleas, upon such an adjudication, to file or record the evidence, on which their judgment is founded; they must make a statement of it. *Ibid.*

SET OFF.

1. Set-offs under our statute are confined to transactions between the parties in the suit;—therefore in an action brought on a check which had been assigned to the plaintiff, the defendant was not allowed to set off a negotiable note made by the drawer of the check, and endorsed to the defendant. *Holland* vs. *Makepeace.* 418

2. The Court will not set off one judgment against another between the same parties, when it appears that others than the nominal creditor are interested by assignment of the demand, on which one of the judgments is rendered. *Makepeace* vs. *Coates.* 451

3. Where, by reason of an account filed by way of set-off, the plaintiff's damages are reduced below twenty dollars, he is still entitled to full costs —*aliter*, where the items in the account are proved to have been delivered and received in part payment of the plaintiff's demand in the action. *Barnard, Adm.*, vs. *Curtis.* 525

SHERIFF.

1. In case against the sheriff for the neglect of his deputy in the service of an execution issued by a justice of the peace, in the plaintiff's favor, upon a recognizance taken in pursuance of the statute of 1782, c. 21, by which the plaintiff lost his debt; where the execution mis-recited the recognizance, both as to the sum in the recognizance, and as to the time of entering into it, it was held that no action lay against the sheriff. *Albee* vs. *Ward.* 79

2. A sheriff cannot be admitted, in a suit between other parties, to change the description of land in his return of an attachment, made by him in a former action, so as to make the description apply to other lands of the debtor. *Williams & Al.* vs. *Brackett.* 240

SLANDER.

1. It is libellous and actionable to write of one, "*I did observe* J. W. *put in a vote for lieutenant governor very soon after the poll was opened, and when not more than ten or twelve votes had been put in, and a few minutes before the votes were all taken, I saw* J. W. *put in a second vote for lieutenant governor.*" — Even though *J. W.* was not present at the election, or though no such election was held. *Walker* vs. *Winn.* 248

See EVIDENCE, 6.
PLEADING, 1.

SPRINGFIELD.

See COURTS, 1.

STATUTES.

1. Where the legislature had set off one with his estate from one parish in a town, and annexed them to another parish, it was held that the effect of the act ceased at the death of the person so set off, and that the land owned by him, with its occupants, then reverted to the former parish. *Kingsbury* vs. *Slack & Al.* 154

2. The statute of 1808, c. 92, respecting the limits of prison yards, militates with no provision of the constitution of the *United States* or of that of this commonwealth. *Walter* vs. *Bacon & Al.* 468

See EXECUTION, 5.
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SURETIES OF THE PEACE.

See JUSTICES OF THE PEACE, 1.

TENDER.

See PRACTICE.

TRUSTEE.

See FOREIGN ATTACHMENT.

TURNPIKE.

1. Where one engages to take a certain number of shares in a turnpike, no action lies against him for the corporation to recover the assessments laid for the purpose of making the turnpike. *New Bedford, &c., Turnpike* vs. *Adams.* 138

2. Where the directors of a turnpike corporation, with the assent of the corporation, procured an act of the legislature, altering the course of the turnpike road, one who before such alteration had subscribed for a share, and had expressly promised to pay all assessments, was held not to be answerable in an action for the assessments. *Middlesex Turnpike* vs. *Locke.* 268

3. No action lies for a turnpike corporation, for the assessments, against one who had subscribed a promise to take shares and to pay assessments thereon, after a part of the turnpike was completed, no act of the corporation either previously authorizing, or afterwards ratifying his subscription. *Essex Turnpike* vs. *Collins.* 292

USURY.

1. Where more than legal interest has been taken on a loan of money, the mortgage or other security for such loan is not therefore void; unless the same was originally reserved thereon · although the party may be liable to an indictment, or an action for the forfeiture given by the statute. *Gardner* vs. *Flagg.* 101

Thompson, Admr., vs. *Woodbridge* 256

2. Where, at the making of a promissory note bearing legal interest from its date, an extra premium was also paid, the note was held to be usurious and void. *Thompson, Exr.,* vs. *Thompson.* 135

3. Where by the terms of a contract the party may, by payment at a day

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certain, avoid any stipulated penalty, such contract is not usurious. *Cutler* vs. *How*. 257

4. *A* owing *B* a sum of money, gave his promissory note payable in six months in a specific commodity at a lower rate than its current value: the note not being paid at the time it fell due, the creditor put it in suit, and afterwards adjusted the suit by taking a new note for the balance of the former, at the low rate of the commodity, and made the new note also payable at a given day in a specific commodity at a lower rate than its current value: this last note was held to be usurious and void. *Cutler* vs. *Johnson*. 266

WATERCOURSE.

1. The owner of land adjoining to an ancient brook of running water may lawfully divert the water for the purpose of irrigating his close: and the owner of a close adjoining the brook below, which becomes less productive by that means, has no cause of action therefor. *Weston* vs. *Alden*. 136

WILL.

1. On the question of the sanity of a testatrix at the time of executing her will, which was in issue to the country, the physicians were inquired of, whether from the circumstances of the patient, and the symptoms they observed, they were capable of forming an opinion of the soundness of her mind, and if so whether they from thence concluded that her mind was sound or unsound: and in either case they were required to state the circumstances or symptoms, from which they drew their conclusions. *Hathorn & Al.* vs. *King, Exr.* 371

2. Where the testatrix at 11 o'clock in the morning gave directions to her scrivener as to making her will, which she executed at 6 in the evening, and died two hours after: the jury were instructed, if at the time of giving directions she had sufficient discretion for that purpose, and at the time of executing the will she was able to recollect the particulars which she had directed, they might find her of sound mind at the time of the executing the will. *Ibid.*

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